



D. C. L. P. 1877  
John Adams Library.

# John Adams Library.

IN THE CUSTODY OF THE  
BOSTON PUBLIC LIBRARY.



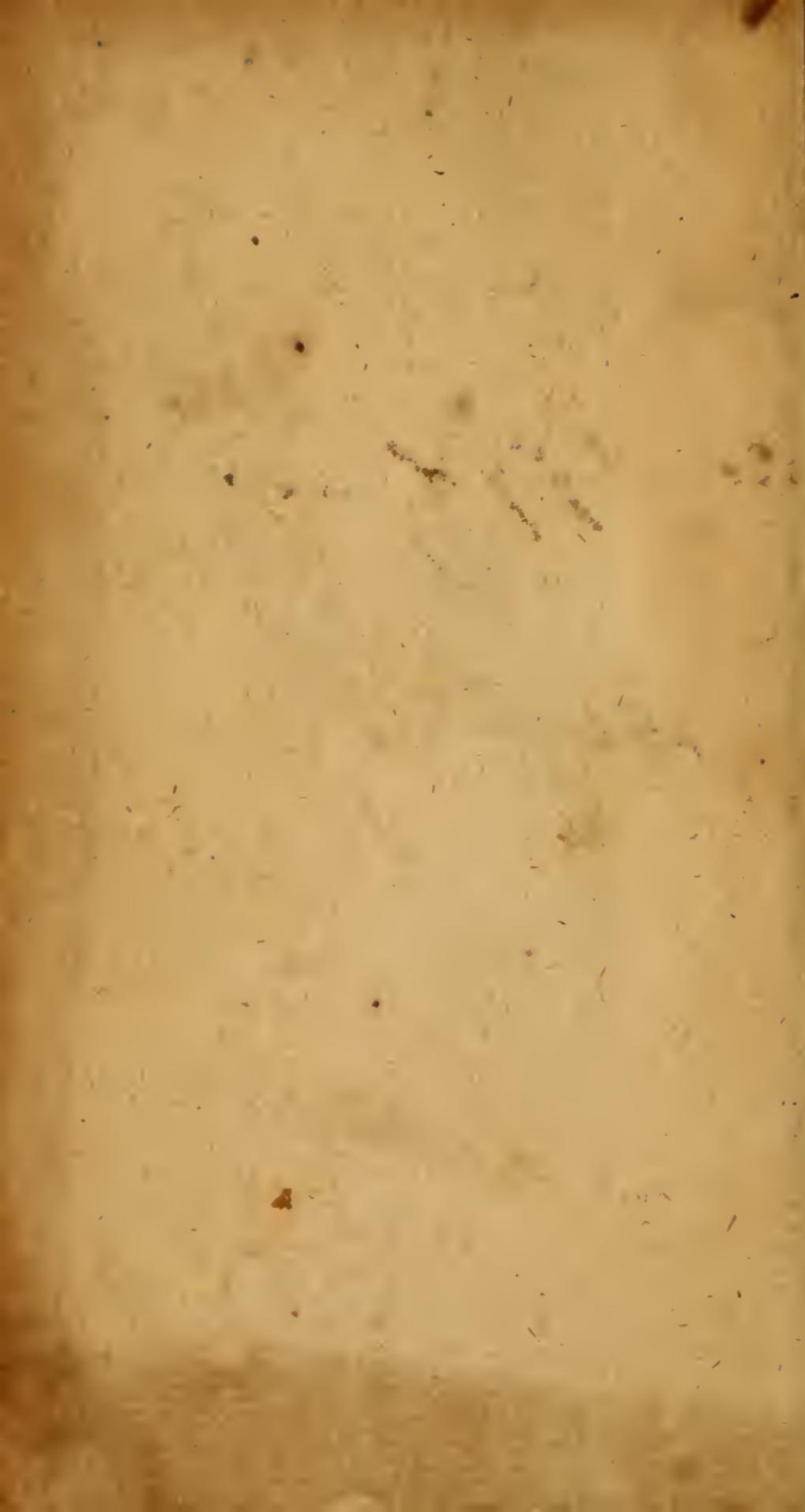
SHELF NO.  
ADAMS  
245.9

Rach: Haley ex

Bought of J. of June 1872  
if piece 2 68

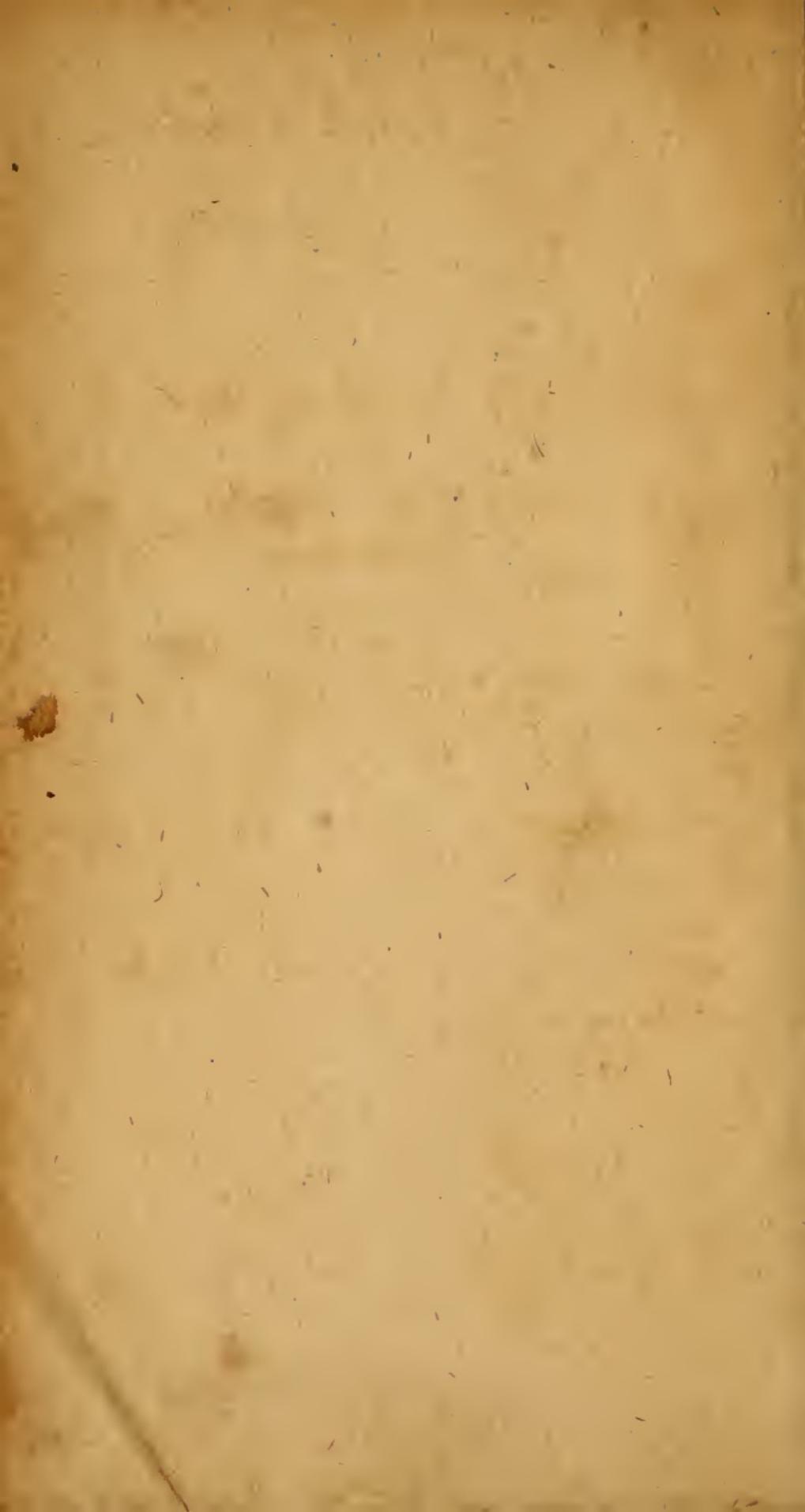
Bought of J. of June

~~Bought~~



Wm Jenkins  
opus Liber

1740



The

Office of Procurator  
the price is 62d

Edited in Danvers County

Mass.

*Sam'l. Quincy* 1760 *Wm' J. Lincoln*  
THE *1760*

# OFFICE and DUTY O F John Adams EXECUTORS:

Or, A TREATISE of  
*Wills* and *Executors*, directed  
to *Testators*, in the choice of their  
*Executors*, and Contrivance of  
their *Wills*.

With Direction for *Executors* in the Exe-  
cution of their Office according to the Law; and  
for *Creditors* in the recovery of their Debts.

With divers other particulars, very usefull  
and profitable for all persons, be they either  
*Executors*, *Creditors*, or *Debtors*.

---

compiled out of the Body of the Common  
Law, by THOMAS WENTWORTH,  
late Bencher of Lincoln's Inne.

---

L O N D O N,

printed by John Streater, James Flesher, and Henry  
Twyford, Assigns of Richard Atkins and Edward  
Atkins, Esquires. 1668.

Cum Gratia & Privilegio Regiae Majestatis.

ADAMS

245.9



## The PREFACE.

**A**Midst the Readers of these Discourses, some not yet un-friendly may ask , perhaps, *Quorsum hæc?* or *Quorsum sic?* Why have we a Tractate and Discourse Legal? or, Why in *English*, and not rather in the Law-language ? To whom, yea also to others, perhaps lesse inquisitive, it will be, as I think, a thing not unpleasing , to hear some reason rendred, why I have set my head and hands to this work so little in use with those of our Profession ; why also in *English*: rather then in the Language wherein our Volumes of Law are for the most part and well-nigh wholly written.

First, for the matter, *viz.* my thus Commenting or making a Tractate upon a Legal Theme.

## The Preface.

1. I have long and strongly conceived, that the more Nobles, Gentlemen, and others, shall be acquainted with the Law of the Land, and the Justness, Equity, Prudence and Providence thereof, the more they will love it and affect it. *Ignorit nul cupido,* The want of knowledge of it causeth the leanness of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a means as well to advance it in their estimation, as to advantage them by it.
2. I have long thought, that we who are the Professors of our Law have been more wanting to it than the Civilians and Canonists unto theirs; who have written very many Volumes. *Spartam quam nactus, hanc exornu,* which hath been said old, and should be assayed anew.
3. More wanting then others before us of our own Profession have we also been, as I think: yet, as of old *Britton, Glanvill, Bracton,* besides not printed,

## The Preface.

printed, *Fleta* and *Ingham*, did lead the way ; so since, Master *Littleton*, and, more lately, Sir *Germin Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitchin*, Sir *Henry Finch*, *Dalton*, have trodden this path ; so as it cannot be taxed with Novelty or Singularity. I mention not Relaters or Reporters of Judgments and Resolutions, nor meer Abridgers, nor Authours of Books of Entries, expressing forms of Declarations and Pleadings, &c. because these have trodden another, (though for the Students and Professors of the Law a very profitable) path.

The tax and increpation of our late learned and judicious Sovereign upon us the Professors of the English Law, as being wholly in effect addicted to our own private gain and advantage, with neglect of the publick, had some strong operation upon me, howsoever upon others; setting for divers years past

4.

King Jam.  
in his Pre-  
face to his  
Book a-  
gainst To-  
bacco.

## *The Preface.*

my pen on work, especially in Summer Vacations, upon divers particular Subjects, whereof this is one and the first-born.

5. To this I may adde the Crown's expectation of somewhat Legal to be published and set forth from time to time, as appears by the special Patents successively granted and renewed for the sole Printin of Books of Law. There is one such in force at this present, and another long hath been in Remainder and expectancy to take effect upon th expiration thereof.

6. And now to adjoin *sic* to *Hæviz*, the reason of my *English*-writting, to that of my writing upon Law-Theme. First, receive the saile King's judgment touching botl expressed in one of his Speeches printed. " Thus I wish, saith he, th  
" Law written in our vulgar Lan  
" guage : For now it is an old mix  
" and corrupt Language, onely un  
" derstood by Lawyers; wherea  
" ever

March  
1609.

*Note.*

## The Preface.

“ every Subject ought to understand the Law under which he lives, &c.

Herein *Andrew Horn*, one sometime of our Profession, agreeth with the said late King, saying, *Abusio est que les Leges ovesque lour enchesons ne soient scaens & conus del touts:* It is an abuse, saith he, that the Laws with the grounds be not known by all. *Ergo*, to be in a Tongue understood by all.

7.  
In his Mirror of Justice.

More plainly and fully doth that our both well-learned and well-descended Sir *Germin* sing in comfort with our said late scientious King. For he first brings in the Doctor of Divinity, saying that henceforth he will take more pains then before he had done to know the Laws of *England*; for that knowledge is *multum necessaria & Clericis & Laicis, imò omnibus in hoc Regno commorantibus, etiam in foro Conscientiae*. And this being in his first Book written in *Latin*; after writing

Lib. 1. c.

24.

## *The Preface.*

writing his second Book in *English*, he expresseth that he so did for this reason, *viz.* To the end that it might be understood by all.

9.

Which of us hath not heard it objected, that we the Professors of the Law seek to hide and secret the knowledge thereof under that dark and distasted Language wherein the Law is for the most part written? Not that I hold it any just excuse for the nescience or negligence of any, that our Books are not in *English*: since, first, it were easie for any diligent and intelligent man, specially if acquainted with the right *French* Language, to understand our broken or brackish *French* in a few days. Secondly, There be both Statutes and some other Law-books in *English*, which are neglected by the most. Thirdly, Though care hath been taken in Parliament in *Edw.* the third's time, that Lawyers should plead, that is, argue and debate Causes,

## The Preface.

Causes, in *English*, which was often desired by the Nobles and Commons, till at last assented and enacted; and in Q. *Marie's* time care was taken, that the Commissions of Purveyors should be in *English*, to the end that all Subjects from or of whom they would take might both see them to be persons authorized, and so also in what manner they are directed to use their Authority, according to the Prince's pious and princely care, that his Subjects should not be abused by his Officers: Yet for this Affair, of having all the Law-volumes speak *English*, I have not heard nor read of any desire or endeavour in Parliament. Fourthly, If the Annals and Reports were in *English*, they are so replete with Debates about forms of Writs, Returns, Pleadings, Essoigns, Imparlements, Protections, Vouchers, Aid-priers, and Counter-pleas of both, and the like, as would easily distaste and discourage any,

( a )

not

2 & 3 Ph:  
& Ma.c.6.  
in fine.

## The Preface.

not intending to profess and practise the Law, from versing much in them, or passing through them. This therefore, as I think, would not much effect the expressed desire.

10.

The thing (in my judgment) fit and fruitfull to produce that good effect would be, to have Extracts of the Materials of the Law, and that not without some good choice and selection, composed in way of Discourse, or Tractate expository, and that in *English*.

11.

I cannot well see or comprehend how any one Legal part or Theme may be more usefull to and for the generality of men, and consequently more generally expetible and wished for, then the *Office of Executors*. For who almost is there, who either is not, or may not be an Executor or Administrator; or at least hath not, or may not have to doe with them, either to receive from them, or to pay to them Debts or Legacies? Or who is there above

*Forma*

## The Preface.

*Forma pauperis*, that may not be a Testator or Will-maker, to the guidance of whom, even in the choice of his Executors and contrivance of his Will, it cannot but be material to know the Office and Duty, the Right and Interest, the Power and Authority of *Executors*; yea of each one Executor, where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be fashioned, generally or specially; what shall come to him, what cannot be given from him; yea, what Goods or Chattels shall go from him, though not given from him? Besides the knowledge for those others necessary, of the safest Wards or Locks for Executors, their *scylla* and *Charybdis*, and the best advantage for Creditors, &c. towards or against them. To me, considering what parts of Law were most behovefull to be communicated to all willing Readers,

## *The Preface.*

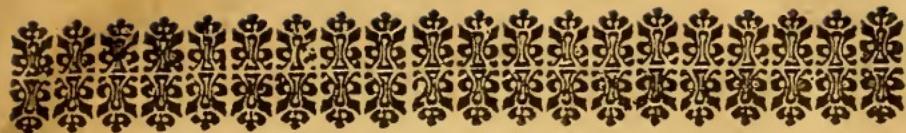
ders, none appeared which could challenge of this the precedence, and therefore I gave it the first and leading place. Thus mine own thoughts. But how far this Discourse may be profitable to any, and to how many, *aliorum sit iudicium*. How many know no more of these, then of the way of a Ship upon the Sea?

12. Lastly , These are not intended for the Learned of our Profession, who have drawn, or can draw, out of the same Fountain which I did, and so need not my help ; but for their sakes who are not Professors of the Law : yet so, as if any young Students may in any part receive fruit by my Labour , I shall not grudge or repine at their so doing. *Bonum quo communius, eo melius.*

*The End of the Preface.*

---

THE



# THE TABLE.

---

## A.

<b>A</b> dministration : where Letters of Adminis- tration may, or must be granted.	4, 143
Assets : what shall be said to be Assets in the Executors hands.	45, 92, 100, &c.
Action : where many Executors, in and against whom were the Action to be brought.	47
Administration : what shall be said to be an Admi- nistration to determine an Execution.	57, 58
Account : Executor to be bound to make a true ac- count.	72, 73
Averia : what the word means.	82, 83
Attachment : what may be attached, what not.	87
Action : to whom choice in Action doth belong.	92
Avowry : who shall avow ; and where, when, and for what.	95
Assignee : Executor the Testator's Assignee in Law, and the force thereof.	144, 168
(a3)	Audita

# The Table.

Audita querela : where it will lie, and for whom, and what.	146, 190, 193, 196
Apparel to a Wife must be according to her degree.	150
Abatement : where a Writ shall abate.	150, &c. 169
Auditors, by Statute Judges of Record.	169
Age : the several Ages of men and women, at which acts may be done or suffered, &c.	300, &c.
Affent of an Executor effectual to Remainders ; and how, where, and when.	337, &c.
Affent of an Executor absolute of what force and validity, and the like of an Affent conditional.	340, 341
Administrators, in effect, the same with Executors.	370

## B.

Bona notabilia : what shall be so called, and the value thereof, and how they cause a Will to be severally proved, &c.	64, &c.
Burial of the dead necessary, and why,	186, 187
Bequests personal, how they may be lost, forfeited, or revoked.	345, &c.
Bequests : what will pass under the name of Bequests,	359, &c.

## C.

Codicill, annexed to a Will formerly revoked, reviveth the same.	35
Creditor made Executor may pay himself first.	46
Chattels real possessory : what shall be taken to be such, what not.	74, &c.
Chattels personal : what shall be and be accounted such, and what not.	79, &c.
	Capias.

# The Table.

Capias. No Capias against an Executor's body for the Testator's Debt.	126
Costs. Executor to pay no Costs, where and when.	148
Contract. Debts by Contract when and how to be paid by Executors.	171, &c.
Covenant. Where an Action of Covenant will lie a- gainst an Executor, and where not.	177, &c.
Where an Executor is chargeable by Covenant, and where not.	179, &c.
Conscience. What an Executor is bound to doe as matter of Conscience.	371, 372.
D.	
Devise. What may be devised by Will, and what not, and by whom.	25, &c. 33, 36
Debts bequeathed by Will must be sued in the Execu- tor's name.	26
Debts how and when to be payd by the Executor, and their kinds.	39, 167, &c.
How a Debt may be forgiven by Will, and how not, and how extinguished.	43, &c.
Debtor. Executor is no Debtor, but a Detainer one- ly, and as such must ever be sued.	125, 210
Dammage feasant: what shall be so adjudged and taken, and by whom.	133
Default of one Executor shall not be a total Default to all.	141
Debt. Action of Debt, what sufficient thereto, and what not.	167
Demand. What shall be a good Demand, and what not.	206, 207
Distress,	

# The Table.

Distress, where, and how, and of what, and the effect thereof.	217, &c.
Disability. Where an Executor shall be disabled to assent.	325, 326
Devisee for life, how, where, and when he may frustrate his Remainder in a term.	343, 344
E.	
Executor, how relating to a Will.	3, 4, 7, 11
His Definition.	3
How and where liable to pay his Testator's Debts, and why, and where not.	6, 7, 8, 154, 155, 162, 164, 184, 185
His Duty.	8, 225
What words make an Executor, what not.	12, 13
After what manner such may be made, and how they may be limited.	14
Executors conditional, who.	15, 16
How their powers may be divided.	17, 18, 19
Who may make and be Executors, and who not.	21, &c. 44
Excommunicate person cannot sue.	24
Executorship may be revoked, and how.	32, 33, 37
Executor may pay what Creditor he will first, not inverting legal order.	46, 205, &c.
Where all the Executors are to be named, and where not.	59, 60, 136, &c. 150
Where an Executor may pay himself, and how, and with what.	113, 114, 204, 205
Executors, though never so many, shall have but one Essoign.	137
	Eftovers

# The Table.

Estovers to be enjoyed by an Executor though not named, where, and how.	147, 148
Where an Executor shall be excused from payment, and why.	162, &c.
Where an Executor's own goods shall be liable, though no Waste.	276, &c. 321
Executor bound by his own Assent to a Legatee.	323, &c. 341
Executor of an Executor his power & duty.	368, 369
F.	
Fee-simple : Lands in Fee-simple devisable by Will, and how.	5
Fees upon Probate and Copies of Wills, and Inventories.	71, 188, 189
Funeral charges, what shall be allowed for the same.	187, 188, 249, 250
Fee-farm Rents, how and when payable to Sheriffs.	194
Feme-Covert : where a Woman-Covert may make a Will, and how.	282, &c.
Whether such may be made Executors without their Husbands consent, and what they can doe if he consent.	291, &c.
Fee-simple cannot afford Remainder, how, where, and why.	333
G.	
Goods : what Interest an Executor hath in his Testator's Goods ; and how it differs from proper and absolute Interest.	122, &c.
Where a Testator's Goods are purloyned or imbezzled	

# The Table.

Zilled by strangers or others, what remedy to recover them, and when, and where. 157, &c.

## H.

Heir, where chargeable by Bonds, and where not. 48  
What shall go to the Heir, to the Executor, and what may be done by either of them to recover their right. 75,76,81,86,&c.97,99,132,&c.

Husband and Wife Executor, the Wife cannot answer without her Husband. 140,321

## I.

Intestate. Where a man shall be said to die intestate, though he make a Will in writing. 5,15,19,290

Inventory how to be made, before whom, and of what.

Judgment. Where Administrator cannot have Execution of a former Judgment, and why. 72  
148,149

Judgments where, and how to be payd by Executors, and why. 195, &c.

A latter Judgment to be preferred before a precedent Statute. 196

Upon Judgments in inferior Courts, how, where, and when Execution may be had into any Court of England. 199

Infant : how, where, and when an Infant may make a Will, and how not. 305,306

When and where an Infant may be made an Executor, and where not. 307, &c.

## K.

No Suit against the King. 65  
Only

# The Table.

Only for the King an Action of Account against  
Executors. 177

Debts to the King of Records are to be first payd by  
Executors, and what are not Debts to the King of  
Record. 190, &c.

## L.

Land how to be settled in a man's life, that it pass not  
by Will: so also of Leases. 27, 28

Legatee, when and how to recover his Legacy, and  
where to sue for the same. 39, &c. 318

How a Legacy may be disposed by the Legatee, and  
where, and when. 40, 316, 317

Lease. What a Lessee may remove, and what not.  
86, 87

Law. Where an Executor shall not be admitted to  
wage his Law. 145

Where a Testator might wage his Law, Executor not  
chargeable. 169, &c.

Lease. Where an Executor may wage a Lease, and  
where not. 171, 172, 211, 215

Legacy, how, where, and when recoverable by the  
Law. 318

How a Legacy may be revoked. 350, &c.

Lease. When and where a Lease shall be void. 332

## M.

Medietas Linguæ. Where a Trial per medietat.  
ling. is allowable, and where not. 149, 299

## N.

Ne unques Executor, a good Plea. 61

Nobleman being Executor shall pay Costs upon a  
Non-suit. 149. Over-

# The Table.

## O.

- Overseer of a Will, his power and duty. 13, 14  
Outlary, what forfeited thereby, and what is not.

23

- Executor out-lawed doth not forfeit his Testator's Goods, and why. 122, 152

## P.

- Proviso repugnant void. 20

- Probate. What an Executor may doe before the Will proved, and what not. 48, &c.

- Where an Executor may be sued before the Probate of the Will; and where the same must be shewed, and where not. 52, 51

- Before whom Probate of a Will is to be made. 62, 63, 68

- Probate erroneous, where utterly void, and where not. 67, 68

- What shall be said to be a good Probate, and the validity thereof. 69

- Probate and Refusal, their relation. 70

- Property. Where the Property of the Testator's Goods shall be turned to the Executor as his own. 127, &c. 147

- Possession of one Executor is the possession of all, where, and when. 142, 143

- When and where an Executor shall be said to have a Possession to make him liable to pay Debts and Legacies. 154, &c.

- Plea. What shall be a good Plea for an Executor, and what not. 210, 216, 221, 245, 248, 257  
Promises

## The Table.

Promises made by the Testator, how and where to be considered, as to satisfaction by the Executor.	223, 224
Proclamation not to be made without Warrant from the King.	231
Plea. What shall be a good, and what a prejudicial Plea to Executors.	263, &c.
R.	
Revocation of a Will, how to be performed, so as to make it null.	29, &c.
Refusal to prove a Will, how it may, or must be.	53, 54
Where an Executor shall not be admitted to Refusal, and why.	55, &c.
Refusal, how far it worketh, and for and against whom, and the force thereof.	59, 60
Replevin, where, and in what it will not lie.	82, 94
Release. One Executor cannot release his Interest to the other; one is the Release of all.	141, 142, 151, 321
Record. Debts by Record, when, and how to be payd by Executors.	169, 170
Recognizances, how and when to be satisfied by Executors.	200, &c.
Rent due at the Testator's death, how and when to be paid by the Executor.	209, &c.
Release: when and how good by and from an Infant; and where not, and why.	309, &c.
Remainder upon Leases for years of what validity in Law.	326, 327, 333 Who

# The Table.

Who shall enjoy such a Remainder.	328, &c.
What shall be said a possibility of Remainder, and what Interest grows thereby.	341, &c.
Relation: what it is.	355
How the same is usefull.	356, &c.
S.	
Seal. A Seal not necessary to a Will.	43
Severance. Where Executors sue, such as will not prosecute must be severed.	140
Scire facias: where not sufficient for an Executor, and where it is.	146, 147
Statute, how to be sued to Extent by an Executor.	149
Specialty. What shall be adjudged a good Debt by Specialty.	167
Debts by Specialty, where to be payd by an Executor.	166, 167, 168, 204
Scire facias: where necessary, and where not.	200, 201, 275
Statutes, how and when to be satisfied by Executors.	200, &c.
Socage, Gardian in Socage how long to continue.	303
T.	
Testator. What shall be said to be a Testator's Goods, and what not.	72
Trespass. Where an Action of Trespass will lie, and where not, and for whom.	94, 95, 96, 100
Trespass. Executor not liable for his Testator's wrong, how, and where; and how, and where he is.	182, &c.
Tithes: of what payable, and of what not.	97
Trover	

# The Table.

Trover and Conversion, where such an Action is maintainable by an Executor.	98
U.	
Vastavit. Where the Sheriff may return a Vastavit, and where not.	241, &c.
W.	
Will, how relating to an Executor.	3, 4
What shall be judged a good Will.	4, 5, 6, 10
Wills of two sorts, and which is the best.	9, 10
Will Nuncupative, how to be made.	11
Two Wills where and when to be proved.	19
What and how many persons may not make a Will, and who may.	20, 21, 22, 24
How a Will, once revoked, may again be revived.	
35, 36	
Waste. Who shall have an Action in Waste, and where, and when.	93, 234, 235, 237, 238
Waste. When, how, and where an Executor shall be said to commit Waste, and where not.	226, &c.
Who shall be suable for such Waste, and how, and where.	231, &c.
Out of what such Waste shall be satisfied, and the remedy to attain the same.	236, &c.
Warranty general, though by implied Covenant in every Demise, yet qualified by Covenant in words.	
181	
Wrong. Who is, and shall be said, an Executor of his own wrong.	246, &c.
How far such becomes liable, and how, and to whom.	257, 258
How	

# The Table.

How such a one shall be sued, and by what name. 254, &c.

What shall be said to be well done by him. 259, &c.

---

## Maxims.

<b>Q</b> uod necessariò subintelligitur, non deest. 7
<b>F</b> rustrà fit per plura quod fieri potest per pau- ciora. ibid.
<b>F</b> actum valet quod fieri non debuit. 56
<b>Q</b> uicquid plantatur solo, solo cedit. 82
<b>S</b> ol sine homine generat herbam. 98
<b>P</b> ro possessore habetur qui dolo desit possidere. 160
<b>A</b> ctio personalis moritur cum persona. 182
<b>P</b> roximus quisq; sibi. 204
<b>I</b> n aequali jure melior est conditio possidentis. ibid.
<b>D</b> e minimis non curat Lex. 213
<b>I</b> gnorantia Juris non excusat. 215
<b>P</b> otestas Regis juris est, non injuriæ: nam potestas injuriæ non est Dei, sed Diaboli. 222
<b>Q</b> ui timent carent, & vitant. 231
<b>F</b> rustrà est inutilis potentia. 289
<b>V</b> olenti non fit injuria. 299
<b>N</b> on est regula quin fallat. 302
<b>Q</b> uando duo Jura concurrant in una persona, aequum est ut si essent in diversis. 319
<b>N</b> ihil tam consentaneum est aequitati naturali, quan- unumquodq; dissolvi eodem modo quo conficitur
353
TH

THE  
OFFICE  
OF AN  
EXECUTOR.

---

THE INTRODUCTION.



HE things considerable touching Executors may all, in effect, be reduced to these three Heads , *viz.*

1. Their *Being*.
2. Their *Having*:
3. Their *Doing*.

By the first I intend their Creation or Constitution, with the incidents thereunto. By the second, their Interest, Fruition, or Possession. By the third, their Managing and execution of their Office. This last was and is the thing principally

B. in

## The Office of

in my intention, and the chief aim of this Discourse; but necessarily it must have some *Ingredients*, some *Concomitants*, and some *Consequents*: as he that travelleth from *London* to *York* to speak with *J S* must needs pass by and through other Towns and Villages, and speak with divers other persons in his Journey and Return. To come first to the first; therein we will consider these six things.

---

### CHAP. I.

1. **W**Hether an Executor and a Will be such Relatives, that one cannot be without the other; and therein of the several kinds of Wills.
2. How and in what words an Executor may be made and created.
3. How he may be in special manner, different from the general, fashioned, limited, or qualified.
4. Who may make, or be made an Executor, who not.
5. What one may give or bequeath by Will; what not.
6. How

6. How a Will or Executor once made may be unmade, and what shall amount thereto, viz. a Revocation total or partial; what to new Publication.
- 

*Of the Relation between a Will and an Executor.*

S to the first; the very name of *Executor* purporteth in general one to execute somewhat, or to whom the execution of somewhat is committed or recommended. In one particular therefore an Executor of a Will must needs be such a one to whom the execution and performance of another man's Will after his death is commended or committed; or who is constituted or authorized by the Will-maker to doe him that friendly office. Hence it followeth necessarily, that a Will is the onely Bed where an Executor can be begotten or conceived; for where

# The Office of

no Will is, there can be no Executor : and this is so conspicuous and evident to every low capacity, that it needs no proof or illustration. On the other side, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done ; yet if no Executor be named, there is no Will : for these two be so relative and reciprocal, as that one cannot be without the other ; if no Will, no Executor ; if no Executor, no Will. Yet here are two Cautions to be affixed : 1. That a man's Mind, Will and Intent touching the disposition of his Goods being declared, although for want of naming an Executor he die intestate, so as Administration is to be committed ; yet for that here is not onely an inchoation or inception of a Testament , but so far a progression therein as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of Goods ; therefore this mind and intention of the Intestate being notified and made known to the Judge, who is to commit Administration, is usually annexed ( as I take it ) to the Letters of Administration ; and meet so to be , for a direction for and to the Administrator,

*Plow.Com.  
185.in Wood  
and Darcie's  
Case, so ex-  
pressly said.*

*Testamen-  
tum, quasi  
testatio men-*

## *an Executor.*

5

ministrator, as well as to the Will fully and perfectly made, but refused to be proved by the Executor, which is usual. Another Caution is; Where a man seised of Land in Fee-simple disposeth the same, or part thereof, by his Will in writing, this standeth good for the whole or part, according to the difference of the Tenure, although no Executor be named: so as the party dieth intestate, and Administration is to be committed, as touching his Goods; and yet hath a Will, as touching his Lands. This may seem strange: but the reason thereof is an Act of Parliament, enabling to dispose of Land by Will in writing; and for that, Land is not properly Testamentary; neither hath the Executor (if any be) any thing to do or intermeddle therewith: and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this devise or disposition of Lands by Will. So as, though where there is not *Testatio mentis*, there is not *Testamentum*; yet may there be the first without the latter. Having now seen that Bequests of Legacies, without making of Executors, doth not amount to a Will: let us now consider whether the sole making of Executors, in the name of a Will,

*The Office of*

without giving any Legacy , or appointing any thing to be done by Executors , whether, I say, this be or amount unto a Will or not ; since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is , as hath been said, to execute the mind , will and intent of their Testator ; and, *Ubi non est testatio mentis , non est Testamentum* , say the Canonists. For answer hereunto , confessing that indeed to be the office of an Executor, I yet conceive confidently, that in the case above put there is a good Will, and as a Will it is to be proved, and approved, for these reasons. First, for that the main part and principal part of an Executor's office, and that which concerns the soul of a Testator , (as our Books speak ) is the payment of his Debts : now who knows not that the very making of an Executor is the constituting of such a person who is to pay all Debts ? and for that cause and end is principally to have and enjoy all the Goods and Chattels of the Testators , and all sums of money to him owing. So as the naming of A and B Executors , is by implication a gift or donation unto them of all the goods

*Sum. Silv.  
fol. 32, b.*

and

and chattels, credits and personal estate of the Testator, and the laying upon them an Obligation to pay all his Debts, and making them subject to every man's Action for the same. And if the Law speak thus much, since *Quod necessariò subintelligitur non deest*, what need then the party express it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needful for him so to have set down in his Will; but there is no meer necessity that every man should give Legacies in his Will: the Estates of many will not doe more then pay their Debts, nor oftentimes doe so much; so as if they should give any Legacies, it must be a dead and a void gift. And suppose a man hath much more, and intendeth all to his Wife, Brother, or Sister, or other Friend, his Debts being by such persons paid; since the very making of the party Executor without any more amounteth to thus much, and effecteth this, what needeth then more words; *Frustrà fit per plura quod fieri potest per pauciora*; as we often speak touching Legal passages, It is needless to write four lines, where two be sufficient. Nor is *testatio mentis*

*The Office of*

mentis here wanting, since the Testator hath made known who shall have the Administration of his goods for payment of his Debts : and it is to be presumed he had no more special Will, since he did not declare more, and left his Executors farther to have and to doe *prout Lex postulat*. And who can say here is nothing to execute ? Is the suing for and collecting of Debts due to the Testator, and paying of Debts by him, nothing ? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an Executor is a designation of a person to be the Testator's Assign, to whom and by whom divers things may be feasible, by virtue of Covenants, Bonds, or other Assurances ; as after , where we come to shew how the Executor represents the person of the Testator, will appear : also of one who , as our Books often speak , is to dispose the Testator's goods for the best advantage of his Soul ; but in stead of that, (since as the Tree falleth, so it will lie or rest ) I will say, as is most for the honour and reputation of the Testator.

*Of the kinds of Wills.*

**N**Ow Wills are of two kinds, or may be two ways made, *viz.* either by writing, or nuncupative, that is, by words not put in writing during the Testator's life; for after the Testator's death this verbal Will must be reduced to writing, and have the Seal of the Ordinary, or Judge Spiritual, thereto affixed: and then it is as effectual, and of as good validity, as if it had been in writing in the Testator's life-time; and so doth the Common Law allow and approve thereof.

*4 Hen. 6. 10.  
E. 4. 1.  
If it be  
written, and  
brought to  
& approved  
by the Te-  
stator in his  
life, it is a  
Will in wri-  
ting.*

*14 H. 6. 5.  
Vid. 5 H. 5.  
1. M. 15. and  
16 Eliz.*

But I advise all to make Wills by writing, and not to leave them to the doubtful fidelity or slippery memory of Witnesses. For as of Leases parol hath been said, that they be Leases perjured, or of perjury; so of Wills parol may be feared. Besides, many times a man doth speak and declare this or that part of his Will, which his wife, child, or friend dissuading, he letteth that purpose and part of his Will to fall, and departs from it: yet Witnesses, wishing it to stand, will perhaps affirm it as part of the Will. As for a Will-gift, and dispositi-  
on of Land of inheritance, if it be not fully  
written

written before the death of the Testator, or done so far (at least) as concerns the disposition of Lands, it cannot be for that part made good by reducing it to writing after his death. As for Goods and Chattels, it may. Yet if it be written before the death of the Testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not onely for Land, as the Case resolved in King Edw. 6. his time was, but also for Goods and Chattels, so as there be an Executor named. But whether shall we say this is a Will nuncupative, or in writing? And, surely, I think that this is a Will in writing, and not onely verbal, though it want subscribing: for we know that many cannot write their names, but onely marks, and what is that? Nay, suppose one wants hands, and cannot write so much as his name; yet doubtless this man may make a Will in writing, it being written by his direction, as his Will which he dictated: nor is the subscribing of the name of the maker any essential part of a Deed, much less of a Will, which needs not sealing, as a Deed doth. Now put we the case, on the other side, that many Bequests or Legacies be named

named in a Wil, and many things expref-  
sed to be done, and no Executor is named  
in the Writing, onely by word of mouth  
*A* and *B* be named Executors : This I  
think confidently is no Will in writing,  
but nuncupative onely ; for that one essen-  
tial part of the Will, *viz.* making of Exe-  
cutors, is wanting in the writing. Nay,  
the appointing of him Executor who is na-  
med in a Note left with *A B*, is no suf-  
ficient making of an Executor, saith the  
*Summif.* And of such nuncupative Wills  
Mr. Perkins reasonably saith, that it pro-  
perly hath place when one, suddenly ta-  
ken with sickness violent, dares not stay  
the writing of his Will, for fear of pre-  
vention by death ; and therefore prays  
his Curate and others to witness what his  
Will is. To this Will not written there  
must be seven Witnesses, and such as  
come not by chance, but are especially  
called for that purpose, saith the *Sum-  
mif.*

*Tit. de Test.*  
*Sum. Silv. f.*

443. b.  
If he survive  
and live a  
long time,  
not causing  
it to be  
writ or atte-  
sted by Wit-  
nesses, me-  
thinks it  
should not  
stand as his  
Will.

*Id. supra, fo.*  
444. b.

*What shall amount to a making one Execu-  
tor, or what words are requisite thereunto.*

**H**aving before made to appear, that  
the being of an Executor is an es-  
sential

## The Office of

fential part of a Will, and so *de esse*, and not *de bene esse* onely, of a Will and Testament: let us now see, first, by what words an Executor may be made; secondly, *de modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the first, though one do expressly by Will name or appoint any to be Executor; yet if by any word or circumlocution he recommend or commit to one or more the chirge and office which pertains to an Executor, it amounteth to as much as the ordaining or constituting of him or them to be Executors: As if he declare by his Will that *A B* shall have his Goods after his death, to pay his Debts, and otherwise to dispose at his pleasure, or to that effect; by this is *A B* made Executor, as was conceived by the Judges in the late Queen's time. And long before that it was held, That if one do will onely that *A B* shall have the Administration of Goods, he is thereby made Executor: yea, in the said late Queen's time, one giving divers Legacies, and then appointing that, his Debts and Legacies being paid, his Wife should have the residue of his Goods, so that she put

If *A B* be  
made Exe-  
cutor, and  
to him and  
*D* some  
goods are  
devised to  
be disposed  
for his Soul,  
*D* is by this  
an Exe-  
cutor for  
these.

39 H.6. Dy.  
290.  
*M. 15 & 16*  
Eliz.  
21 H.6.6,7.

put in security for the performance of his Will ; by this, without more, was she an Executor, as was held by three Justices, (*viz.*) *Manwood*, *Harper* and *Mounson*, in the Lord *Dyer's* absence. And so also where an Infant was made Executor, and *A* and *B* Overseers, with this condition, That they should have the rule and disposition of his Goods, and payment and receipt of Debts, unto the full age of the Infant ; by this were they held to be Executors in the mean time. And if *A* be made Executor, and the Testator after in his Will expresseth that *B* shall Administer also with him, and in aid of him ; here *B* is an Executor as well as *A*, and if *A* refuse, *B* alone may prove the Will as Executor, notwithstanding it be onely said, he shall Administer with *A*, and in aid of him. Thus many ways, and by divers words of implication, one may be made Executor, although not expressly so named by the Will. But if *A* be made an Executor, and *B* a Co-adjutor, without more, he is not by this an Executor with *A*, as in K.H.6. his time was held : nor hath such Coadjutor or Overseer any power to Administer, or intermeddle otherwise then to counsel, persuade, and advise ; yet

<sup>21 H. 6.6.</sup> yet I think he may, and in Conscience  
<sup>24 Ed. 3.</sup> should so doe. And if that will not pre-  
<sup>F. Exec. 121.</sup> vail to rectifie negligence or miscarryings  
<sup>29 Ed. 3.39.</sup> in Executors, he shall well perform the  
trust reposed in him, if he complain in  
the Spiritual Court, or Court of Consci-  
ence: and it is reason, I think, that so do-  
ing upon just cause, his charges be born  
out of the Testator's estate, or the Execu-  
tor's purse who otherwise would not be  
reformed.

*How an Executor, or his Executorship, may  
be limited or qualified in special manner,  
different from the general.*

**N**ow let us see how this making of an Executor may be specially qualified. And first, the time may be limited when he shall first begin to be Executor; and that either certainly, or with some contingency. Secondly, the creation may be conditional. Thirdly, it may be partial, or dividedly, and not intirely.

As to the first, one may appoint  
*F S* to be his Executor a year or  
more time after his death; this is good.

Sc

So also if *A* appoint *B* his Son to be his Executor when he shall come to full age , and in the mean time he dieth intestate. Again , one may appoint the Executor of *A* to be his Executor : and then if he die before *A* , he is Intestate untill *A* die. This creation may also be conditional, and the condition may either be precedent or subsequent. In the time of King *H. 6.* one did name *A* and *B* his Executors , and if they would not take it upon them, then *C* and *D* should be his Executors , and then there *A* and *B* refused , and the question was, whether in Suit against the Debtors of the Testator, *A* and *B* should join with *C* and *D*; as where four Executors be named, and two refuse , and the other two prove the Will , yet all four must be named in Suit against the Testator's Debtors , as was there admitted : but in the principal Case it was resolved , That the Suit should be onely in the name of *C* and *D*, for that the appointment of them Executors if *A* and *B* did refuse , did imply that then they onely should be Executors ; and here all four were never made, nor intended to be Executors, but *A* and *B*, upon a condition subsequent

*Vide Gros-  
brook &  
Fox. Plorda.*

*A and B  
made Exe-  
cutors, but  
not B to in-  
termeddle  
during the  
life of A ;  
and good.*

*32 H.S.Bre.*

*155.*

*3 H.6. fo. 6.*

sequent, that they should not refuse; and *C* and *D*, upon a condition precedent, *viz.* if *A* and *B* did refuse. It is usual to make one or more Executors conditionally, that they put in security to pay Legacies, or, in general, to perform the Will; nor was it ever doubted, as I think, but that this was good: yet I should advise that such Condition be plainly thus expressed, *viz.* either thus, that if *F S* do put in security, &c. by such a day, then he shall be Executor, else not; or thus, *viz.* to make him Executor conditionally, that before he do Administer (Funeral perhaps excepted) he shall put in such security; else, perhaps, he being Executor till the Condition broken, in that mean time he may have disposed of all or most part of the Testator's estate. In the late Queen's time there was a Case remarkable to this purpose: One Willed, that if his Wife suffered *F S* to enjoy *Black-Acre* (being be-like part of a Joynture) for three years, then she should be his Executor, or else *A B* should: and the question was in the *Common Pleas*, Whether presently, before the end of the three years, she were Executor; or not till she suffered the

the Land to be enjoyed three years; and it was held by all the Judges but the Lord *Anderson*, that she was presently Executor, untill she should disturb *I S.* &c. For upon that done, it was agreed that the Executorship would by virtue of the Condition be transferred from the wife to *A B.* But now during these three years might she have disposed of all the goods of her husband, yea, within one of these three years, and less time, and then have broken the Condition, and have left to *A B.* a dry Executorship.

Now to the third Point, one may divide his Executor's power three ways, <sup>19 H. 8. 3.</sup> <sup>19 H. 8. Dy.</sup> *viz.* Really, Locally, or Temporally. <sup>4. H. 1. 33</sup> <sup>Eliz. in com.</sup> Really thus: He may make *A* his Executor for his Plate and Household-stuff, *B* for his Sheep and Cattel, *C* for his Leases and States by extent, *D* for his Debts due unto him; and so divide the Power and Administration of his Executors at his pleasure. He may divide them also or their power Locally: *viz.* *A* for his goods in *Com. Buck.* *B* for those in *Com. Oxon.* and *C* for those in *Com. Berk.* <sup>32 H. 8 Bro.</sup> <sup>115.</sup> He may also divide them in Time: *viz.* his Wife or any other person to be Executor during her life, or during the mi-

nosity of his Son, or so long as she continues Widow, and after his Son to be Executor. So of like limitations or divisions, either for time, place, or things, where-with they shall intermeddle. Nay doubtless, one may be made Executor for one particular thing onely, as touching such a Statute, or Bond, and no more; and thereof good use may be made, as I think, thus. Many have Bonds, Statutes and Recognizances, for warranty or enjoying of Land, or freeing or saving harmless from incumbrances, in general or particular. Now he which hath these selling the Land, may by Letter of Attorney lawfully assign them to the party who buieth the Land or Lease: but this notwithstanding, the interest remains in him who selleth, and by his Outlawry they may be forfeited, or by him released any Bond to the contrary notwithstanding: and if he die, the interest in Law will be in and go to his Executors, and in their names onely Suit or Execution may be had and maintained.

*Quær. If not  
Assets in  
Law, when  
obtained.*

Now then, if the Vendor, besides assignment, make, as to the Statute, Recognition, or Obligation, onely the Vendee Executor: by this the interest, after death

death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quær.* if the Vendee, his Heirs and Assigns, may be made Executors, so as that security shall go to them one after another, without renewed making of Executors. Thus if the party make no other Executor, he dieth Intestate as to the rest of his estate; and as to this specialty onely shall have an Executor, and must have a Will proved: And in case he do make another Will for his estate residue, there must be two Wills proved. But in the other case, where by one onely Will one is Executor for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premisses of a Will two be made Executors jointly and equally; yet there may be a *Proviso*, that one shall not meddle during the others life, so as they shall be Executors successively, and not jointly. And thus also to other purposes aforesaid, a subsequent Cause or *proviso* may make the partition and division of authority. But if the *Proviso* or

32 H. 8.  
Bro. Exec.  
55:

*The Office of*

clause subsequent be merely contrary to the premisses, it will be void : as where two were made Executors with a *Proviso* or *Clause*, that one of them should not Administer his Goods ; this was, held void for repugnancy by *Brudenel* and *Englefield* Justices. But *Fitzherbert* Justice was of mind that it was not void, nor utterly repugnant : for the other might join in Suits, though not administer. And Justice *Shelly* was of a third opinion different from all the rest, *viz.* That here was a repugnancy , but the last Clause should controll the Premisses : and so this one onely should be Executor.

*VVho may make an Executor.*

**S**OME persons may be unable to make Wills, and consequently Executors for that is all one : whosoever may make a Will, may make an Executor. There be nineteen several kinds of persons unable as the *Canonists* say, to make Wills : but with many of them we will not intermeddle, because we find no mention of them in our Law. The persons principally and most usefully to be consider'd of by us are either the defective in understanding

as

as Infants, Idiots, Lunaticks, and the like; or defective in power or Interest, as women covert or married, persons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as Aliens, Corporations, Villains, Monks and Friars. As for Infants and women covert, because much is to be said of each of them and their Administrations, we will forbear to treat of them in this place, but after will do it of each severally.

To begin with an Idiot; naturally he is not able to make a Will, as was resolved in the Spiritual Court, because he wants the use of Reason to conceive what it is fit for him to will: nor doth the Common Law oppose this, as I think.

A Lunatick, having *Lucida intervalla*, that is, some seasons of enjoying his right mind, and freedom from his Lunacy, may in those times of his right mind make a will & Executors, else not; for even one by age or sickness become of *non sana memoria* is unable to dispose of lands or goods.

One deaf and dumb born may make a Grant, saith Mr. Perk. if he have understanding, which is hard, as he confesseth, consequently much more a Will; but in the time of King Hen. I. it is left a

<sup>3</sup> *Eliz. D.*  
*203, 204.*

*Vide plus in*  
*Perk. S. 6.*  
*33 H. 8.*  
*Dy. 55, 56.*  
*Vide 26 El.*  
*3. 63. Lib.*  
*Intr. 396.*

*18 Ed. 3.53.* Demurrer, whether a Deed by such be  
*26 Ed. 3.63.* good or not. If but mute, he may wage  
 So in effect his Law, and atturn by signs, and so per-  
*44 Aff. p.30.* haps by signs declare his Will. *44 Aff.*  
*P. 81 Eliz.*  
*Pescatia de*  
*Fountain's*  
*Case.* *p. 36.*

An Alien may make or be an Execu-  
 tor, so as he be not an Alien enemy, for  
 such cannot sue, as in the late Queen's  
 time was held: but there the doubt was,  
 whether a Subject of *Spain* were at that  
 time to be held an enemy, no war being  
 proclaimed between the Kingdomes,  
 though hostility exercised.

As for persons Attainted, Convicted,  
 or Out-lawed, it will be said, that these  
 can have no Goods of their own; and  
 consequently they can make no Wills,  
 nor Executors; and it is not to be denied,  
 that we find it pleaded sometimes by  
 Executors, that their Testators stood  
 out-lawed. But first it is clear, that all  
 and every of these may have Goods as  
 Executors to others, which neither are  
 forfeited by Attaintment or Out-lawry, nor  
 devested by marriage or Villainage. There-  
 fore, as touching them, they may make  
 Testaments. And that all these sorts of  
 persons may be Executors, is also evident.  
 So also touching Villains, Monks, and  
 Friars,

Friars, who can have no goods to their own uses. And that one attainted of Felony may have an Executor, appears by the Case in the late Queen's time wherein it was long debated, Whether such an Executor might maintain a Writ of Error, or not, to reverse the Attainder of the Testator. And as for other Out-lawries, the Plea thereof by the Executors, that their Testator was and died out-lawed, proves not a nullity of the Will, or Executorship; for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did or could come to them for satisfaction of the Debts, by reason of Out-lawry; yet it hath been delivered, not of old onely in many Books, but by some of late, that Debts upon Contract, where the Defendant may wage his Law, are not forfeited by Out-lawry, nor uncertain Damages for Trespass in Battery, or false Imprisonment, &c. *Quær.* of breach of Covenant. But goods taken away by a Trespasser, may yet be forfeited by the Attainder or Out-lawry of him from whom they were taken; for that the property in right still appertained to him, and he might have taken

29 *Aff.* p.<sup>7</sup>  
63. 49 *Ed.*  
3. 5. 50  
*Aff.* p. 15.  
33 *H.* 6. 27.  
9 *Eliz.* D.  
26. 2. *Contra.*  
*Co. lib.* 4.  
*fol.* 95.  
19 *H.* 6. 47.  
30 *Ed.* 3. 4.  
16 *Ed.* 4. 7.  
5 *Ed.* 3. 53.  
6 *H.* 7.

them again wheresoever he found them; therefore the Action for this shall not come to his Executor, but for the other not forfeited it may.

*15 H.7. fo.7.* Whether an Excommunicated person be able to make a Will or not, may be some doubt, since *Keble* denieth him ability to present to a Church; and in the very point anciently the opinion of *Canonists* hath been negative, but more lately grew affirmative.

*Summ. Silv.  
tit. Testam.*

*42 E. 3.1.*

*VVho may be Executor, more.*

*A*N Excommunicate person cannot sue, that is, proceed in Suit as Executor, till he be absolved, there being danger of Excommunication to all that converse with him; but this makes not a nullity of his Executorship, nor overthrows the Suit, but stays it onely from proceeding untill Absolution. As for persons attainted or outlawed, we have before spoken affirmatively in way of proof that they may make Executors, for continuation of the Executorship; so of Aliens and others before. Recusants convicted at the time of the death of any Testator are disabled to be his Executors.

*21 H. 6.30.*  
A Clark at-  
taint may be  
an Executor  
by-past.

*Just.*

*Pascat. de  
Fountain..*

But an Ali-  
en Enemy  
cannot sue  
as Executor.

*P. 31 Eliz.*

*3 Iac. cap. 5.*

Whether Corporations compound,  
or

or consisting of divers persons , may be made Executors or not , I doubt . First , because they cannot be Feoffees in trust to others use . Secondly , they are a body framed for a special purpose . Thirdly , they cannot come to prove a Will , or at least to take an Oath as others do .

*VVhat a man may give or dispose by his Will.*

**H**Aving considered of the makers of Executors by Will , and of them so made ; let us now consider what by this Will may be disposed , given or bequeathed . And first , he who himself is an Executor cannot by his Will give or bequeath to any other the Goods , Chattels , or Credits he hath as Executor , the property not being altered ; for that he hath not them properly as his own or to his own use : onely he may make a continuation of the Executorship , and his Executor shall have them as Executor to the first Testator , as was resolved by the Judges of both Benches in the late Queen's time . And if he be Administrator , the Bequest is then also void , nor then will they go to his Executor , but to a new Administrator ; but on his Death-

*Bransby  
vers. Gran-  
tham. Plow.  
Com. f. 525.*

*Hil. 20  
Eliz.*

At any time  
in his life  
he may alter  
the proper-  
ty.

So 48 E. 3.  
fol. 14, 15.  
where the  
Bequest was  
to one of the  
Executors, it  
was held,  
that the o-  
ther Execu-  
tor might  
release it.

If sufficient,  
otherwise to  
pay all one  
as if none.

48 E. 3. p.  
14, 15.  
11 E. 3.  
Fitz. Tit.  
Cond. 9.  
where both  
stated joint-  
ly by one  
Grant.  
Differences  
between  
joint Te-  
nants and  
Tenants in  
common,  
holding by  
several  
Grants.

Death-bed he may give them by Word or Deed, though not by Will. Next, if a man have Debts owing to him, as many have much, it is considerable, whether by way of Bequest in his Will he can give away these to any from his Executors. And doubtless he cannot effectually in Law; they being not subject to Assignment unto any, except the King. - So as if he give such a Debt to *A*, and such to *B*, yet must the Suit for them be in the name of the Executor; and so also the Release or Acquittance for them; and not in their names to whom the Bequest is. But when they be received, if there be no Debts to pay, the Executor ought to deliver them to the party to whom the Bequest is, and thereunto may be compelled in Court of Conscience or in the Spiritual Court. Therefore the Case of the bequeathing money payable upon a Mortgage is in this manner to be understood to be good, and not otherwise, as I take it. He that is jointly with any other estated in Lands or Goods, can give no part by his Will, but all will survive: but by Act in his life he may dispose of his part; and the Assignee may dispose of his moiety by Will, yea, though

it be half an Horse or Oxe, that cannot be divided. So of a Lease of Lands, or Tithes, or Grant of Goods to two, *Habendum*, one moiety to the one, and the other moiety to the other; each may give his moiety by Will. But if one be possessed or estated for years, by Lease, Wardship, or Extent, &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of these; but, notwithstanding, they will remain unto his Wife upon his death: but yet his Gift or Grant of them taking effect in his life-time would bind his wife, and carry away the interest from her. If one be Tenant for the lives of one or more others, (as oft-times men take Leases for lives of younger persons than themselves) this cannot be by Will disposed of; for that it is no Chattel, nor is it within the Statutes of Wills, for that it is no state of Inheritance. Therefore let the party look to convey it in his life-time, lest it go to an Occupant, *viz.* him who first shall enter. If it be an estate in Land, he must either make Livery, have a Bargain and Sale enrolled, or Covenant to stand sealed to the use of his Wife, or some of his

Another kind of Tenants in common.

his bloud, or make a Lease for years determinable upon those lives. Good it be by bargain and sale for years, if the thing be in Lease; that so without Inrollment or Atturment the Rent may pass: else a bargain and sale may be made for a month or such like time, and then a Release or Grant of the Reversion in stead of Livery and Seisin. But if a man have a Lease for never so many years, determinable upon life or lives, that is, if such or such live so long, (which unskilled persons call a Lease for lives) this State may well enough be given and disposed by Will, because it is but a Chattel. If a man be seized in Fee or in Tail of Land having Corn growing upon it, and by his Will do give the Corn, and die before severance, this is a good Bequest; because the Corn should have gone to the Executor. So it is also of a Parson touching his Glebe, and a man seized in the right of his wife or his own right but for life. But as for Trees growing upon the ground, these can no otherwise be given by Will, then as the Land it self upon which they grow may be given; of which matter, as not pertaining to the Office of Executors, viz. how and in what manner Lands may be given by

*Sta: Merton.  
cap.2. Vidue  
possunt lega-  
re tam de  
dotibus quam  
de aliis, &c.*

*Quer.* If the trees may be devised by the Statute of Wills, without giving the Land it self.

Will.

Will, I intend not to treat in these Discourses.

*Of the Revocation and Countermand of  
Wills, and new Publication.*

**H**aving considered of the making of Wills and Executors, let us, before we come to the Probate, consider of Revocation; for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz.* *Inception*, which is the making, and *Consummation*, which is the death of the Testator or maker of the Will, there is power in him at any time before death to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications or Re-affirmance of Wills, in whole or in part. As heretofore a Will may be made by word, so also may a Will made in writing be by word revoked or disannulled: for since every making of a later Will is a Countermand and suppression of the former Will; and since a Will may be made Nuncupatively or by word, and so

*Omne testa-  
mentum  
morte con-  
summatur.  
See the plea-  
ding of it by  
making a la-  
ter Will.  
Lib. Intra.  
f. 323. b. &  
641. a.*

so by making a verbal Will one may revoke a written Will : it will thereupon follow, that one by Word may express the alteration of his Mind thus far, that the Will by him formerly made shall not stand, but be revoked and annulled ; and this will stand, and be effectual ; so as if he after die, without making any new Will, or new Publication, or re-affirmance of the former, he dieth intestate, or without Will. As a Will may be wholly revoked, so also in part. Hereabout a good resolution was in a *Kentish Case*, where one *Ryete* by his Will in writing did give some Gavel-kind Land to one *Harrison*, and five dayes before his death, said, in the presence of Witnesses, that this Gift should not stand, and that he would alter it when he came home ; desiring them to bear witness of his Revocation. Now before he came home, he was killed by the said *Harrison*, who caused the Will in writing to be proved ; and after he was attainted and hanged for the murther, and his Son, by the Custome of *Kent*, (*viz.* the Father to the Bough, and the Son to the Plough) entred into the Land. And this manner of Revocation by word only

onely was held sufficient, although the Will in writing were not cancelled, nor defaced. And the like Resolution, or verbal Revocation, is implied in the Case of *Forse* and *Hembling*; where it being resolved, that a *Feme Covert*, or married woman, by word Countermanding and Revoking her Will formerly made, when she was a sole or unmarried woman, this was not effectual, nor of force; by reason of her *Covverture* taking away the freedom of her Will. Hereby it is implied, that another who hath freedom of Will may by word sufficiently evoke a Will in writing; and so was it once also admitted in the Case between

Sir *Edward Mountague* and *Ieoffries*,  
touching the Will of Sir *Io. Ieoffries*: but here a difference was conceived betwixt  
saying, *I will revoke my will*, (which one-  
ly expressed a purpose or intent, and therefore was no present Revocation,) and saying, *I do revoke it*, or, *It shall not stand*, or, *My Heir shall have my Land*; which crossed the gift of it by the Will. And as Wills may be wholly or in part evoked; so may also the Executorship of one or more of the Executors, and yet the Will may stand in all the other parts,

M. 28 & 29  
Eliz. Co. lib.  
4. fol. 60.

7 H. 6. fo. 13.  
M. 38, 39  
Eliz.

parts; so as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, because no Will can stand without Executors: and this Revocation may be by word onely, without being expressed in the will, or any other writing. But I could wish all to express such Revocation in the foot of the Will, or that the name or names of the Executor or Executors so revoked be expunged or blotted out of the Will; and that this be done in the presence of some Witnesses, to testifie the act and intent of the Testator.

Again, Revocations may be by act in Law as well as in fact, or by direct and express terms: as in the said Case of *Mountague and Jeoffries*, where Land being devised by Will, and the Devisor after making a Feoffment, though there were some defect in the Livery to make it effectual; or if he made a bargain and sale that was never inrolled, or granted the Reversion, but no Atturment had so as the Land passed not; yet in all these Cases the Will or Gift of Land stood revoked. But in case he had onely covenanted that he would have made such an estate, and not done it; this was hel-

*Vide 6 E. 6.*  
*Dy. 74. &*  
*3. & 47. &*  
*Ma. 43. a.*

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was : But of this *Quære* ; And , if a difference may not be betwixt making a Lease for years and a Lease for life , which altereth the Free-hold. If a Lease for twenty years be bequeathed to *J S*, and after the Testator maketh a Lease for fifteen years, reserving a Rent ; I take this to be no Revocation of the Bequest : but if the Testator, after this Will made, take a new Lease for a longer term, so as the former Lease is surrendred in Fact, or in Law ; this must needs be a Revocation of the Bequest, or at least an Adnullation thereof ; and that although the Bequest were generally of his Lease , not mentioning the number of years : for this which he now hath is another Lease , and not that which he had at the time of the making of the Will. So , if one give his black Gelding by Will, and after, before his death , he selleth or giveth away that Horse , and buieth another black one ; this new-gotten Horse shall not pass by the Will, because it was not the Testator's at the time of making his Will. So also, if the Crop in the Barn be bequea-

D                            thed,

thed in *October*, and the party lives till that time twelvemonth, having sold that Crop, and inned a new; this latter Crop shall not pass by the Will, and the former cannot.

Again, as Revocation may be by Alteration of the state of the Devisor in the Land devised; so may it also be by Alteration, in some case, of the state or quality of the person of the Devisor. As if a Woman sole make a Will, and after take a Husband, this, without any more, as is resolved in the Said Case of *Forse* and *Hembling*, doth work a Revocation or Adnullation of the Will; for that else it should be irrecoverable, since she, having lost the freedom of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked; yet in case her Husband before or after marriage with her were bound or covenanted to perform this Woman's Will, if he so do not, by payment of the Legacies therein bequeathed, his Bond or Covenant will stand good, and be suitable against him: as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*, who first was bound to perform it. Yet another Case there is

of Alteration in the state of the Testator's person, which makes no Revocation of his Will; as if he being of sound mind and ability make a Will, and after becometh frantick. In this case this is no Revocation; so as his Will stands till his death irrevocable, if he recover not. Now of a Will revoked there may be a Reviver by a new Publication; and thereof now.

*Of new Publications.*

**H**aving shewed how a Will may be revoked, and so lose its force; let us now see how, without making a new Will, that so revoked may be revived and set on foot again. And that is divers ways. As first, by a *Codicill* annexed after thereunto; as was resolved between *Betford* and *Barnecot* in the *King's Bench*. Secondly, by adding any thing to the Will, or making a new Executor. Thirdly, by express speech or word that it should stand, or be his Will: as I conceive to have been the better Opinion in the said Case of *Mountague* and *Jeoffries*; wherein yet was much difference of Opinion, both touching

M. 38. 29  
Eliz. in B.  
reg.

Revocation, and new Publication. If a man, having made a former Will, do make

*44 Ass. p. 36.* a latter, which is more then a bare Revocation ; yet if afterward, lying upon his death-bed and speechless , both these Wills be delivered into his hand , and he required to deliver to one of his Friends about him that Will which he would have to stand, and to keep in his hands the other, and he thereupon delivereth to the Minister, or other his Neighbours, the first-made Will , retaining in

*44 Ed. 3. fol. 33.* his hands the latter, as was done in the time of *Edward the third*; here the former Will , though made void many years before by the latter , is revived , and shall stand as the partie's Will. But now put the case that a Bequest at the first is void ; yet by Publication after it may be good : as if one give to *Sarah* his Wife a piece of Plate, or other thing, and hath no such Wife at the time , but after marrieth one of that name , and then publisheth his Will again ; now this shall be a good Bequest. So if one devise Lands or Goods which one hath not ; if he after do purchase the same, and then say, that his Will before made shall stand , or be his Will , it shall be

be a good Will and Bequest ; for this, in effect, is a new making. And though most of the precedent Cases be of Revocation of particular parts of the Will, and not of the total ; yet first, be it considered, that that part so revoked was, in effect, the substance of the Will ; next, it is easily discerned, that if one part be revocable, so is another also. And thus Revocation may spread it self over the whole : Nay doubtless, the whole *uno flatu* may be revoked, as well as by parts ; even as a Faggot may be put wholly into the fire, as well as stick by stick. And as the *Velleities* or disposing parts of the Will are revocable and revivable by new Publication, as afore said ; so is also the constitution of Executors. As if one of the Executors names be stricken out, and afterwards a *Stet* be written over his head by the Testator or by his appointment, now is he a revived Executor. So if the Testator express by word, in the presence of Witnesses, that the party put out shall yet be Executor. But now I mean, where the Executor's name is not so blotted out but that it may be read and discerned ;

for else the *Stet* is upon nothing: and if the verbal Re-affirmance should renew his Executorship, then must the Will be partly in writing, and partly Nuncupative, his name not being to be found in the written Will.

---

## C H A P. II.

Of the state of things instantly upon the Testator's Death, before any Will proved,

---

Here we will consider these several things.

1. What is wrought by a Gift of a thing certain and known; as the White Horse, the Red Cow, &c.
2. What by a Bequest to an Executor.
3. What wrought by a Release in the Will to a Debtor.
4. What by making a Debtor or Creditor an Executor.

**A**S touching the first, viz. the Bequest of a Chattel, real or personal, which

the

the Testator had in possession: notwithstanding that, if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and died before they had been taken, he to whom they so were given might have taken them; yet in this case of Gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them or recover them from the Executor, or a stranger take them by any Suit at the Law, for that he hath no property in them; yea, if the Bequest be to himself who is made Executor, be it of Lease, Plate, Cattel, &c. they shall not vest nor settle in him as Legatee, but as Executor, untill express or implied election; but he is to have and take the same by way of Legacy. And the reason in both Cases is this, *viz.* That the Law prefers Debts and the satisfaction of them before Legacies, and ties Executors also to that rule; and therefore will transfer nothing from or out of the Executor, till he, having considered of the state of the Debts to be paid, & Goods out of which the same are to be paid, shall find that safely this or that Legacy may take effect without making any defect in payment of Debts, or drawing

1 & 2 P. &  
Ma. Dy. 110.  
a. & 139. b.  
Vide Co. 8. f.  
95 & 96.

Of the second, see  
Co. 10. f. 47.  
652.  
So resolved  
Pas. Trin. 37  
El. in b.a.m.  
onely Gaw.  
contra Port-  
man Pl. &  
Simes Def.  
See more of  
this Tit. Le-  
gacy; and  
of the assent  
of one Exe-  
cutor onely.

upon him and his own Goods any Damage or loss, as a Waster, and thereupon shall assent to such Legacy. Thus now is the Law taken; but heretofore some Opinion hath run otherwise, *viz.* That he to whom any Bequest was made of a thing known and certain, might take it without any assent of the Executor; and that when to the Executor himself any Goods or Cattel, movable or immovable, was bequeathed, in case there were otherwise sufficient goods for satisfaction of Debts, the same should instantly upon the Testator's death, without any act or election by the Executor, be transferred into and unto him in his own right as a Legacy, and not remain in him as Executor. As for sums of money bequeathed, or so much in Plate or Rings, it is evident that they must be had by the delivery of the Executor: Yet hath the Legatee such an interest before delivery, as that, dying before payment, it will not go to his Executors. But, as I take it, no such person, to whom any thing certain is given by Will, can make any Gift or Grant of it before the Executor have assented to his having thereof: nor, perhaps, will the Executor's assent after the

Grant

*27 H. 6. 8.*  
Of late, perhaps, some single or sudden opinions may also have run that way: but in *Fortman's Case* the Point was divers times argued, and then adjudged as before.

To be bought.

Grant have such relation as to make  
good the Grant precedent : Why so yet, *Quære. OF*  
*this see*  
*more after,*  
*Tn. Legacy,*  
*thereabout.*  
more then an Atturment of a Lessee,  
which is a like Assent to the Grant of a-  
other? And *Quær.* if by the Outlawry  
of the Legatee before the Executor's Af-  
tent this thing bequeathed be forfeited.

If without just cause an Executor will  
refuse to assent, he is compellable by Law  
Spiritual, or Court of Conscience : yet if  
Spiritual Court press to do, where is just  
cause to stay, a *Prohibet* lieth, *ut credo*; for  
since Executors stand liable to recovery of  
Debts against them by Common Law, it is  
reason that Law enable them to keep  
wherewith to pay. And here yet note some  
seeming opposition in the Law: For where  
before great difference was shewed be-  
tween a Devise or Bequest, and a Gift or  
Alienation executed in one's life-time;  
yet the Lord *Dyer*, reports it to be resol-  
ved, That where a Lease for years was  
made upon condition that the Lessee  
should not alien in his life-time, yet a  
Bequest of this Lease by his Will was a  
breach of the Condition, as being an Alie-  
nation in his life-time.

3. Of a discharge by Will to a Deb-  
tor some question may be, whether to  
per-

perfect and make good this, so as the Debtor may plead it in Bar, there be no requisite, as in the former, an assent of the Executor. On the one side, since this giving is a forgiving, for he to whom it is bequeathed cannot otherwise have it thereby way of Retainer, it may probably be said, that here needs no such assent of the Executors, as in the Case where anything is to be transferred; for here is rather an Extinguishment and an Exoneration, then a passage of a Chattel by way of Donation. On the other side, it is probable that, it being but a Bequest, and so a Legacy, since Debts are in Law and Conscience to be satisfied before any Legacies, therefore the Executor, having not sufficient otherwise to satisfie his Testator's Debts, may sue for this Debt, and refuse to suffer it to pass away as a Legacy. And to this Opinion do I encline at best for Creditors; and satisfaction of Debts is by Law respected as an act greatly concerning the Testator's Soul. But some will, perhaps, make a contrary doubt, that although there be an assent of the Executors to this discharge, yet it will not amount to a Legal Release; for that a Debt, at least if it be by Specialty,

cannot

annot be released but by Deed , and a  
Will is no Deed ; for a Seal is not necessa-  
y thereunto, though it be fit and conve-  
nient. Whereto I give this answer, that  
Will, though it be not properly and le-  
gally a Deed , for it may be good enough  
without a Seal, which is an essential part  
of a Deed ; yet hath it the force and effect  
of a Deed : for as a Release cannot be  
made but by Deed ; so neither can an E-  
state or Interest, though but for years, in  
Tithes, Advowsons, Commons, Fairs, and  
like things, be granted or assigned other-  
wise then by Deed : yet it is clear that  
such a state for years in any of these may  
be given by Will, as well as a Lease of  
Land ; which proves a Will to have the  
force and effect of a Deed.

*Not de esse,  
but de bene  
esse.*

*Of making a Debtor or Creditor Executor ;  
and first of the Debtor made Executor.*

Suppose we then that *A* and *B* being  
made Executors, the Testator was in-  
debted to *A* twenty pounds , and *B* was  
indebted to the Testator twenty pounds ,  
how do things stand presently upon  
death ? First, it is clear that the Debt of

21 H. 7. 31.  
Plow. Com.  
185. contr.  
Danby &  
Chake, 8 E.

*B* to 4. 3.

And may be granted, that he should account before the Ordinary for it.

---

Yet it seems Plowd. 186.  
a. the Law was taken to be *ut supra.* 8 E. 4.

Though he never administer.  
21 E. 4. 3.  
81. 11 H. 6.  
38.

---

2 R. 3. 20.  
per Starkey,  
& 22. per  
Vavasor.  
9 H. 5. 13.  
Left a De-  
murrer in  
Trespass by  
all, against  
the Execu-  
tor, who was  
Trespasser.

*B* to the Testator stands in Law extinct this making of him Executor being a Release in Law.

Therefore let Creditors take heed making their Debtors Executors. And ye doubtless (methinks) such a Debtor mad Executor should hold himself restraine in Conscience from taking benefit there of , if ( the Debt remitted ) there shall want to satisfie either Debt or Legacy to the Testator. And I doubt whether Court of Conscience may not justly so order , the Testator being perhaps ignorant of this point in Law , that this Debtor should be released by making the Debtor Executor.

And what is spoken of making the Debtor Executor, generally the same is to be understood of making any one of the Debtors Executor , where there be many joyned-Debtors : and so where many Executors be made , and but one of them is Debtor to the Testator ; for they cannot sue without making him who is the Debtor also a Plaintiff, which he cannot be against himself. The like Law touching Actions of Trespass or Account. Yet of old, where one made his Bayliff one of his Executors together with *A* and *B* , who brought

routed an Action of Account against the  
ayliff in their two names onely , Justice  
*Terle* held the Action well brought. This <sup>3 E. 3. 23.</sup>  
as in the beginning of King *Edward* the  
third his time ; but the contrary hath been  
once resolved. Some also have held, that  
though in the life of this Executor who  
was a Debtor he could not be sued ; yet  
after his death , the surviving Executors <sup>6 H. 4. 3.</sup>  
might sue his Executor. But that cannot be,  
s I take it, for that the Debt was utterly <sup>21 H. 7. 31.</sup>  
extinct by the making of him Executor, as <sup>20 E. 4. 17.</sup>  
the Testator had released it to him ; yea, <sup>21 E. 4. 3.</sup>  
though his Executor died before he did  
ever Administer or prove the Will. And <sup>61.</sup> *Plowd. Com.*  
like extinguishment of the Debt, if the <sup>185.</sup>  
Creditor marry with one of the Executors <sup>11 H. 4.</sup>  
of the Debtor : yet was there an Action of <sup>f. 83, 84.</sup>  
Debt maintained *temp. Ed. 3.* by the Hus-  
and and Wife against the Husband and <sup>31 E. 3. Fitz.</sup>  
ther Executors, upon an Obligation by  
the Testator to the Wife before her mar-  
riage. But if a Debtor take Administration  
of the goods of his Creditor, this , me-  
hinks, should not discharge him, but that  
is Debt should stand as *Assets* in his hand,  
because the Intestate did no act to free him  
from the Debt.

*The Debtee or Creditor made Executor.*

*Plow. Com.*  
185. By all  
the Judges,  
but Brook  
Chief Just.  
*Plow. 185.b.*  
where the  
goods be of  
more value,  
which shall  
be so alte-  
red?

*See Plow.*  
*Com. 544.*  
the like of a  
Legacy of  
20 l. given  
to the Exe-  
cutor.

Or if the  
goods a-  
mount in all  
to no more  
than this  
Debt.

**T**HIS making of the Debtee Executor and so the party who both shoulde pay and be paid the Debt, giveth him clearly power to pay himself before any other, if his Debt be by Specialty, or upon Record. Nay, some have held, that so much of the goods of the Testator shall be altered in property out of the Executor as Executor, into him as Creditor; but how that can be I cannot see: For whether it shall be satisfied out of the Lease and Chattels; real or personal, whether out of the Corn in the Barns, Cattle in the Fields, Plate, or Household-stuff this, till some election made by the Debtee Executor, cannot be known nor shall be effected by any operation of Law preventing the Executor's election in taking his satisfaction where and how he will: For certainly, as a Executor hath election to pay which Creditor he will first, so hath he election to pay and satisfie himself by what part of the Testator's goods he will yet, perhaps, if there be ready money in the Executor's hands, there shall be an alteration

ration of the property of so much there-  
as was owing by the Testator to the  
Executor. And if there come not to the  
hands of such Executor sufficient to pay  
himself, he may have an Action of Debt  
against the other Executors, or the  
Heir, as by some hath been conceived:

See *Flow.*  
*Com.* 185.  
13 H.8.15.  
11 H.4.83.  
12 H.4. 21.  
20 E.4. 17.  
21 E. 4.3.

let let it be well advised of, whether, if  
he do Administer at all, and specially  
he pay himself any part, he have not  
ereby barred or disabled his Suit for the  
fiducie. But if he refuse to Administer  
all, it were very unreasonable that  
he should not be able to sue the other  
Executors: for so a Debtor might by sub-  
tly make his Creditor an Executor with  
hers, and take a course that his goods  
ould come onely into the hands of those  
hers, so as the Creditor could not  
y himself; and consequently, if he could  
t sue the other Executors, he should  
us be stripped of his Debt by a sleight.  
nær. if he may bring the Action in  
e name of the other Executors onely,  
e Will being proved in his name as well  
in the names of the rest; or whether the  
Action shall be brought in his name  
o, and then he be severed at his own  
ayer. But against the Heir there is  
none

*Flow.* 184.b.  
& 185. b.  
He is bar-  
red; for he  
cannot ap-  
portion his  
Debt.

<sup>12 H. 4. 21.</sup>  
He may sue  
the Heir, if  
the Heir be  
bound, and  
he have not  
sufficient  
goods as  
Executor.

none to join with him ; and him may sue, if he have not Administred as Executor ; this admitted, that the Bond exten to the Heir, which without express Word it doth not, though for the Executor it b otherwise.

Thus having considered of the state things before and without any Will pro ved, or other act done by Executors ; W should now come to the point of the proo but two things pertinent to it are in ord precedent.

### CHAP. III.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of refusal, and the things incident therunto.*

*Before Probate what may be done by or Executors.*

—  
A S to this, it is clear, that befo proving of a Will by the Execute he may seise and take into his hands al of the goods of the Testator ; yea, ent in

into the house of the Heir (if not locked) so to doe, and to take the Specialties of Debts; and generally he may doe all things which to the Office of an Executor pertain, (except onely bringing of Actions and prosecution of Suits.) He may pay Debts, receive Debts, make Acquittances and Releases of Debts due to the Testator, and take Leafes or Acquittances of Debts owing by the Testator: yea, if before such proving the day occur for payment upon Bond made by or to the Testator, payment must be made to or by this Executor, though no Will be proved, upon like cause of forfeiture as if the Will were proved. Also an Executor may before Probate sell or give away any of the goods or chattels of the Testator. And whereas the Assent of an Executor is necessary to the setting and execution of a Legacy, as before hath bin shewed; so as if one give me his white Horse or black Cow by Will, or my other well-known thing, I cannot after his death take it, though I come where it is, but am punishable by Action of Trespass at the Executor's Suit, if he do not assent: yet an Executor before the Will proved may give his Assent, and it will stand good. Yea, although

9 E. 4. f. 33.  
47. 7 H. 4.  
18. They  
cannot sue  
till they  
have the  
Will under  
the Seal of  
the Ordina-  
ry.

Wray. 23 Eliz.

he die after any of these acts done, the Will being never proved by him; yet these Acts so done stand firm and good as I take it. Yet (as I find) an Executor making his Will, and dying before he hath proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were after Debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testator's goods with the Will annexed; as by Doctor Drury was in the late Queen's time declared to be the Law and course of the Court Spiritual; to which credit was given by the Judges of our Law and the Court Star-Chamber: for though the Book doth not mention it to have been in Star-Chamber, it is else-where so reported. Yea an Executor, for goods of the Testator taken from him, or a Trespass done upon the Lease-Land, or a Distressing or Impounding of Goods or Cattel, may maintain, before the Will be proved, Actions of Trespass, or Replevin, or Detinue; for these Actions arise upon the Executor's own Possession.

<sup>22 & 23 E.</sup>  
Dy. 372.

Dy. in Plow.  
Com. 281.  
Case of  
Greysbrook  
and Fox.

But before the proving of a Will, an Executor cannot maintain a Suit or Action of Debt, or the like. And the reason is, for that therein he must shew forth the Will proved under the Seal of the Ordinary. And so, as I take it, must it be if he bring any Action for Trespass done or Goods taken in the Testator's life-time; so as the Testator himself was intit'led to the Action, and it grows not upon the Executor's Possession. I find that an Executor granting the next Avoidance of a Church which to him came from the Testator, the Grantee maintained a *Quare impedit* without shewing forth the Will: But the Executor himself might so have done s of his own Possession before the Will proved, and so without shewing it under the Seal of the Spiritual Court, as well as Actions of Trespass or Replevin, for goods taken after the death of the Testator: yet in the principal Case of *Greys-brook and Fox*, which was an Action of Detinue by the Executor for goods taken or detained after the Testator's death, the Plaintiff did shew forth the Will proved. But that proves not any necessity hereof; or that, if the Will had not been

34 P. & M.  
Dy. 135. a.  
Dy. in Plow.  
Com. 281. a.

Plow. Com.  
275. b.

proved, it could be no hurt to shew it forth. So upon his own Contract for the Testator's goods : as if the Executor sell Cattel or other goods of the Testator before the Will proved, he may for the money payable maintain an Action for Debt before he have proved any Will: and in this, and the Action of Trespass, there is no necessity of naming him Executor. Also, on the other side, an Executor may well enough be sued for Debts of the Testator before the Will be proved ; for he may not by his own act of delaying the Probate of the Will keep off Suits, except he will refuse in due manner, that so Administration being granted, there may be some body suable by the Testator's Creditors for Debts by him owing. And the usual Plea of the Defendant, to estrange himself from the Testament, is to say, that he neither is Executor, nor hath Administred as Executor. So as if he either be Executor *de jure*, or *de facto*, by his own Act of Administring, it sufficeth.

Of refusal to prove the Will, and therein of  
Administration, fore-cluding  
Refusal.

Now touching this other point fit to be thought of before we meddle with the Probate, *viz.* Refusal to prove; we will thereabout consider these several parts. *viz.* First, how and in what manner Refusal may or must be. Secondly, in what cases or in respect of what Acts one named Executor hath lost or determined his election of Refusal or Acceptance. Thirdly, of what effect and operation the Refusal is; what difference where all the Executors refuse, and where but some or one of them. Fourthly, what Relation it hath.

Now touching the first: the Ordinary, before committing Administration, where 3 H. 7.14.

Will is made and Executors named, if he know of it, must send out Process against the Executors, to come in and prove it: and if they do not come, they are to be excommunicate; but if they do come, if they, nor any of them, will prove, by reason of such Refusal the Ordinary may commit Administration: perhaps also they may be appointed Executors at a time future, and not presently.

9 Ed. 4.47.  
3 Hen. 7.14.  
Plow. Com.  
281.

Now Refusal cannot be verbally, or by word, but it must be by some Act entred or recorded in the Spiritual Court, and therefore must be done before some Judge Spiritual, and not before Neighbours in the Countrey; for that is not effectual. Ye Sir Ralph Rowlet making the Lord Keeper Bacon, Catlin Chief Justice, and the Master of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration who did so, making every of their Refusals to be recorded: and this was held good. So as a Lease being by that Will bequeathed to Catlin, and he, after this Refusal, entering and assigning it to one, and the Administrator assigning it to another; it came in question between them whether had best right; and Judgement was given for the Assignee of the Administrator against Catlin's Assignee: whereas if the Refusal had been void, Catlin had continued Executor, and so his Title had been better. For in case the Ordinary himself had made Executor, there ( saith the Book ) he may refuse before his Commissary: and so was it there pleaded for the Arch-bishop of Canterbury, who was made Executor to Sir Will.Oldhaile.

*9 Ed. 4.33.  
See Pl. 184.2.  
If Debtee  
made Exec-  
utor sue  
the Ordina-  
ry for the  
Debt, this  
amounts to  
a Refusal of  
the Execu-  
torship.*

*M. 28 & 29  
Eli. inter  
Brooker &  
Carter, in  
ba. com.*

*9 Ed. 4.33:  
The Book  
calls him  
Cardinal of  
Canterbury.*

*What*

What shall be such a meddling or Adminis-  
tring by an Executor, that he cannot  
refuse after.

AS to the second, where an Executor hath Administred he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election : at least the Ordinary ought not to accept of such Refusal, but should compell him to take upon him the Executorship, as the Law was taken both in the time of *Ed. 4.* and of Queen *Elizabeth.* Yet if the Ordinary do admit one to refuse, notwithstanding that he have Administred, this standeth good, as it seemeth conceived by the Judges in the time of *Henry 6.* For here the Executor commanded one to take goods of the Testator out of the hands of *F S,* who did accordingly, and afterward the Executor refused before the Ordinary, and Administration was committed to the said *F S,* who brought an Action of Trespass against the party so taking the goods from him ; and there

9 Ed. 4. 47.  
Selling Land  
as Executor  
is Admin.  
*Dyer in Case  
of Greys-  
brook & Fox.*

Pl. Com.  
280. b.  
*Fas. 7 Eliz.*

36 Hen. 6.

*J. 7, 8.*

the Refusal and committing Administration were admitted to be good: so perhaps, *Factum valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executor's such intermeddling at the time when he did admit of his Refusal. After Refusal, and Administration committed, the Executor cannot go back to prove the Will and assume the Executorship: but if onely upon the Executor's making Default to come in upon Proces to prove the Will, the Administration be committed; here the Executor may yet at any time after come and prove the Will, and so undo the Administration: as was in the late Queen's time resolved between *Bale* and *Baxter.*

*Mich. 27,  
28 Eliz.*

But what if after Refusal it shall appear to the Ordinary, that the Executor hath Administred before his Refusal, so as had it been then known, the Ordinary should not have admitted him to refuse? whether now may he revoke his Administration, (for it is revokable) and enforce the Executor to proceed to proving of the Will? And surely, methinks he may; for that the Executor by Administring had determined his election, and accepted the office of Executorship:

*Boxell's Case  
in com. Ban.*

nov

ow he cannot both accept and refuse. Besides, we know that Creditors may maintain their Suits against him having once Administr'd; the Common Law to free himself, and shew that he is not the party suable for the Testator's Debt, being that he neither is Executor, nor ever did Administer as Executor; wherefore he having Administr'd, it will be found against him. Now it is not con-  
trary to that in the Spiritual Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this point of Adminis-  
tring is so material to the point of being admitted or not admitted to refuse, we will here consider in this place briefly what shall be said to be an Administrati-  
on by an Executor determining his electi-  
on, and disabling his Refusal, and what not.

Some will, perhaps, conceive, that the Case of the Executor in the fore-mention'd Case, where he onely commanded *JS* to take goods of the Testator's out of a stranger's hands, was no Administration; and it is true that in that Book it is passed in silence, and not expressly said to be an Adminstration. But the *L. Dyer*, in the Case of *Greistbrook and Fox*, speaking of that Case,

*A* being  
Executor  
did admini-  
ster, and  
yet would  
not prove  
the Will. *B*  
took Admi-  
nistration;  
and being  
sued for  
Debt, did  
plead the  
matter *su-  
pra*, and it  
was held a  
good Plea;  
and it was  
found for  
him before  
Just. *Dothe-  
ridge ad Ox.*  
in a Stat. 2  
*Carol. Reg.*

32 H. 6.7.

Case, saith expressly, that the Ordinary might there have rejected the Executor Refusal; for, saith he, when the Executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit that to have been a Administration. And elsewhere it held, That if an Executor take goods of the Testator, and convert them to his own use, this is an Administration; yet if he do but take them into his hands, sa some, without converting of them. If the Wife take more Apparel of her own than is necessary, this is an Administration; the Book admits: but if by the assent or delivery of the Executor, it is not. Moi

clearly, If one do either pay Debts of the Testator, or receive Debts, or make Acquittances for them, or demand the Testator Debts as Executor, or give away goods which were the Testator's, or deliver money of the Testator's for Fees about proving the Will; all these be full and clear Administrations as Executor. But, saith *Fitzherbert*, if he onely lay out his own money for Fees, this is no Administration; so saith *Frowick*, if he pay Debts with his own money, and if he doe it about the Funerals. But some difference

ay be between A&ts done by one named  
ecutor and by a stranger, *viz.* to make  
m an Executor of his own wrong;  
hereof we shall speak after, not in this  
lace. If one being sued as Executor take <sup>9 Ed. 14.2,</sup>  
upon him, and plead in Bar as an Execu- <sup>13. 33 H.6.</sup>  
r; this is an Administration. <sup>31. a.</sup>

*Of the force and effect of Refusal.*

A S to the third Point, *viz.* The force  
or effect of Refusal; first, it is clear  
that if there be but one Executor, and he  
o refuse, or being many, if they do  
ll refuse, then is the party dead Inte-  
cate, and Administration is to be com-  
mitted with the Will annexed, as is be-  
ore said, nor can any after meddle as  
Executors. But in case there be divers  
Executors, *viz.* A, B, and C, and A onely  
efuseth, and the Will is proved by the  
thers, there A continueth Executor  
otwithstanding his Refusal; so as he still  
may release Debts of the Testator, and  
Debts owing by the Testator may be re-  
eased to him: yea, if Suit be to be hid  
y or against the Executors, it shall not  
e in the name of B and C onely, but A  
lso must be named as a Plaintiff or De-  
fendant,

Cook 1.5.f.  
28. Com. 18  
E.2. Bro.8.

37.

22 Ed. 3.19.  
15 Ed. 3.  
Exec. 8.  
41 Ed. 3. f.  
22.21 Ed. 4.  
f. 24.

fendant, else the Action may be overthrown. For the Will being proved, the Executors therein named stand and continue Executors, notwithstanding any of their Refusals; as it was resolved in the latter end of the late Queen's time, according to divers former Resolutions. And therefore this Executor which hath refused may afterwards administer at his pleasure, and intermeddle with the goods

*42 El. Co. 9.  
Jol. 36, 37.*

as well as the others: yet, saith *Brooke*, Chief Justice, after the death of his Companion he cannot so doe; but then the Executor of him who proved is only to administer.

*Quod non est Lex.* There may

be some difference between Suits by Executors and Suits against Executors:

*4 & 5 Ph.  
& M. Dyer  
163. c. 6.  
Contra 21*

when they themselves sue, they being privy to the Will and having the custody

it, must bring their Action in the name

all the Executors, according to the Will

but he that is to bring an Action against them need not, perhaps, take notice of more Executors than those that have proved the Will, or otherwise do administer:

for it is no good Plea for themselves in an Action against them to say there is another Executor, without saying also that he hath administered, as it seem

et

by divers Books. Nay, one Book in  
the time of *Henry 8.* goeth farther, viz.  
that if the Suit be brought against all,  
but one of them not intermeddling with  
the proving of the Will may plead that  
he was never Executor, nor administered  
Executor. By this it should seem that  
Executors refusing, (I mean all of them,  
as no Will is proved) they in an Action  
against them may say that they were ne-  
ver Executors: but, methinks, they should  
not so plead, but shew the special mat-  
, as was done in the time of *Edward* <sup>per totam curiam.</sup>  
the fourth.

As for Relation, I will forbear to speak,  
till I come to proving; for that Probate <sup>9 Ed. 4. 33.</sup>  
and Refusal stand in the same state as  
touching Relation.

---

## CHAP. IV.

### *Of Proving Wills.*

Now let us see touching the Probate  
of Wills what is considerable; and  
herein, of these three or four parts:

1. *Where, and before whom, and how the  
Proof must be.*

2. *What.*

2. What shall be Bona notabilia, to inti  
to Probate.
3. What force or validity either a rig  
or erroneous Probate hath.
4. What relation either Probate or I  
fusal hath.

As touching the first Point, viz. Ho  
and where, and before whom, Wills are  
be proved, briefly thus :

The proving is in the Spiritual Cour  
yet in some Mannors, by Prescription  
Wills are to be proved before the Ste  
ward, though no Lands thereby pass, as a  
ppears by divers Books : and in the Mann  
of *Mannsfeld* is this Prescription ; and  
others, whereof *Tremaille* was Steward  
King *Richard* the third his time, as he d  
clared. And the like I may tell of r  
own knowledge touching the Mannors  
*Cowly* and *Caversham* in the County  
*Oxford*, where I have kept the Courts f  
the Lord Vicount *Wallingford*, and found  
in present and frequent use. And it  
said by the Judges in the time of King  
7. That this proving of Wills in the Co  
Spiritual is not ancient, but of later tir  
Yea it is acknowledged by *Linwood*, t  
Dean of the Arches, that it pertains not  
the Spiritual Court of common right ; n

2 R.3.Fitz.  
Co. lib.9.  
fol. 43.

11 H.7.12.

so in use in other Kingdoms. The reason  
hy the Law of *England* hath herein given  
ay to the Ordinary and Court Spiritual,

Plow. Com.  
279.

said by *Walsh* in *Greysbrook* and *Fox's*  
ase to be the Piety and Integrity which  
presumed to be in those of that Funeti-  
n, having charge of Souls. Indeed they  
re, as it seems to me, Executors of the  
ew Testament, or last Will and Testa-  
ent of *Jesus Christ*, whereby great Le-  
acies and Gifts are given to men, and by  
astors to be dispensed and distributed :

f which Distributers it is required, as <sup>1 Cor. 4. 2.</sup>  
*Paul saith, That they be found Faithful.* <sup>Acts 20. 27.</sup>

nd happy are they who with him can  
lead *Plenè Administravit*, viz. that they  
ave fully Administred, as he did; much  
epending thereupon, viz. God's honour,  
the Blessing, Prosperity and Safety of the  
Country, the Piety, Justice, Conscience,  
Contentation and Salvation of men. As  
or Wills proved in *London* and *Oxford*  
efore the Mayor, that is onely in respect  
f the Burgages within those places devi-  
ble; but they were to be proved also  
efore the Ordinaries in respect of the  
oods, and there onely where no Lands  
re bequeathed.

The proving then is to be before the  
Ordi-

*Vide fol.*  
*proxim.* OF  
*Bona Notab.*  
 both in  
*Canterbury*  
 and *York.*

Ordinary, General, Particular, or Special. By General I mean the Metropolitan or Arch-bishop, before whom it is to be proved; in case the Testator have good valuable, called *Bona Notabilia*, in divers Diocesses whereof he is Superior.

*Of Bona Notabilia.*

**VV**Hat shall be said to be *Bona Notabilia* is considerable; for thereabout hath been much diversity of opinion: Some holding that they must be of forty shillings value, some five pound, some ten pound; yea, some, that the value of a penny sufficeth to draw to the Arch-bishop from the particular Bishop. But that difference of opinion conceive to be now cleared by a Canon made in the first year of King Charles his Reign at a Convocation then held whereby it is established, that five pounds shall be the sum or value of *Bona Notabilia*; yet therein is this Proviso, that whereby Composition or Custom in any Diocesses *Bona Notabilia* are rated at a greater sum, the same shall continue not altered. It is likewise thereby provided that if any man die in *Itinere*, viz. in his Jour-

*Canon 92,*  
*93.*

journey or travel ; the goods which he  
then hath about him shall not cause that  
Administration shall be committed, or  
the Will proved before the Metropo-  
tan.

Having considered of the value, now  
another Point observable is, what things  
shall be said to be *Bona Notabilia*. And  
as to that, Debts owing to the Testator  
are *Bona Notabilia* as well as Goods  
in possession, their value being answer-  
able : yet, I think, if the Penal Sum of the  
Bond be but five pound for payment of a  
less Sum, although the Bond be forfei-  
ted, yet in the Spiritual Court, where re-  
spect to Conscience suppresseth the fa-  
vouring of Executors, this will not be  
taken to be *Bona Notabilia*, viz. of five  
pound value, although in Law the whole  
Penal Sum be a duty. But if the Debt  
be five pound or more, though it be  
desperate, or due from the King, against  
whom no Suit can be, but onely by Pe-  
tition, yet this will stand for and as *Bona*  
*Notabilia*, as I take it, in the Court Spi-  
ritual ; though thereabout I can but con-  
jecture, since the Rules of our Law deter-  
mine it not. And this Point, touching  
the King's being Debtor, I find deba-

21 Eliz.

Goods con-  
siderable, or  
conspicu-  
ous.

Hil. 17 Eliz.  
M.Com.Da.  
Vide 13 and  
14 Eliz. Dy.  
305.

ted in the late Queen's time, but not r  
solved, so far as I find. But there *Po  
ham* at the Bar urged that no Debt shou  
be *Bona Notabilia*; and if it should, y  
not such for which no remedy by Suit,  
in that Case, the Queen being Debtor. Y  
a farther Question Local is touchi  
these Debts or things in Action, in wh  
Place or Diocess they shall be said  
be as *Bona Notabilia*, viz. whether  
the place where the Debtors be, or whe  
the Obligations or other Specialties  
And as to this, the Law hath been take  
That because the persons of the Debt  
be moveable, passant and transitory; the  
fore these Debts shall be said to be a  
to make *Bona Notabilia* where the Bor  
or other Specialties be, and not where i  
Debtors inhabit and dwell. And so wa  
not long since conceived by Justice *Wal  
sley* and Justice *Beaumont* in one *Pre  
man's Case*, no other contradicting  
Herein therefore many are mistaken, w  
onely in respect that the persons of  
Debtors do dwell in forein Diocess  
other then the places of the death of  
Testator, or where his other goods we  
do take Administration in the Prerog  
tive Court, though the Specialties rem

d where the party died, or his goods  
idue were. But in case the Debts be  
ely by Contract, without Specialty,  
en indeed they are to be esteemed *Bona  
Notabilia* there and in that place where  
e Debtor is, as the said Judges well con-  
ived the difference. But in case Land  
given to Executors for payment of  
ebts or Legacies, this shall not be *Bona  
Notabilia*, as I take it, though it be *Assets*.

*Of the validity and invalidity of  
Probates.*

S to the third Point, we will first  
see of what validity an erroneous  
oof is, and thereabout we shall find  
s difference. Admitting that one hath  
*Bona Notabilia* in divers Diocesses,  
as of right the proving of the Will ap-  
taineth not to the Metropolitan, and  
the Will is proved before him; this  
not meerly void, but stands in force till  
e reversed by some Sentence upon Ap-  
al; as was resolved between *Vear* and  
*ffries*, in the late Queen's time. But  
the other side, in case one have *Bona  
Notabilia* in divers Diocesses, or a Pecu-  
liary and a Diocese, and yet the Will is  
F 2 pro-

22 Eliz.

proved before the particular Bishop within whose Diocese part of the Goods are; this is merely and utterly void, without any Reversal. So also of proving some Peculiar. And in case one have *Bona Notabilia* both in the Diocese of Canterbury and in the Diocese of York; the Will must be proved either before both Metropolitans, if within each of their Jurisdictions there be *Bona Notabilia*, in divers Dioceſſes; or else, as I take it, there so be not in any of the places, then before the particular Bishops in those several Dioceſſes where the goods are. If within the one Jurisdiction Metropolitan the Testator had goods in divers Dioceſſes, and in the other but in one Diocese; then in the one place is the Will to be proved before the Arch-bishop, and in the other place before the particular Bishop, as I conceive. And so also in peculiar Jurisdictions. And in so places Arch-deacons have peculiar Jurisdiction ordinary, and power to prove Probates of Wills, and grant Administrations. But where any like error or mistake proving is in these respects, it is cause of Reversal or of Nullity, according to former difference: so also if there be fa-

ood in the proof, were it *communi for-*  
*â,* that is, without Witnesses, or by exa-  
mination of Witnesses; yet may it in the  
spiritual Court be undone, if either dis-  
proof can be made, or proof of Revoca-  
tion of that Will once made, or of the ma-  
ning of a latter.

Now, admitting the Will true and  
right, and also rightly proved; let us yet  
see the force and strength of the Proof of  
Will so proved. It being under the Seal  
the Ordinary cannot be denied, saith  
the Book, to wit, whether this shewed  
whether be a Will proved or not; no,  
though the Proof be but indorsed on the  
book, *viz.* that it is so proved, saith the  
book. But notwithstanding the Defen-  
t so sued may deny that the Plaintiff 9 Ed. 4. 47.  
Executor, as not being concluded nor 22 Ed. 4. 50.  
stopped by the Probate so to say. And 22 H. 6. 52.  
the reason is, because the Seal of the Or-  
dinary is but matter in Fact, and not mat-  
ter of Record: nor are the Sentences of  
Divorce and the like, in the Spiritual Plowd. Com.  
Court, Judgments or matters of Record, 282. 44 Ed.  
hath been often held. 3. 32. 19  
Aff. p. 2.

*Of the Relation of Probate and Refusal.*

Plow. Com.  
281, 283. **A**S for this last Point, both the Proving and the Refusal shall have Relation to the death of the Testator, as take it, to divers purposes. So as to t Proving, saith the L. Dyer expressly and confidently in *Greisbrook* and *Fox's Case* and the resolution also of the Case provit. For there Administration being committed before any Will proved or no fied to the Ordinary, as it should see the Administrator sold some of the goods to *J S*, and after the Executors (provi the Will) brought an Action of *Detinere* for those goods against *J S*, who pleaded this Administration and Sale: and the upon the Executor demurred; and Judgment was given for him, as having the proving of the Will disproved Administration *ab initio*. But it is to that Judgment was given onely by 10 Judges; one being absent, and the other dissenting in opinion: yet I think it right and according to Law, and the Refusal shall have the like relation; could not the Administration relate to the death of the Intestate, as it doth to such

18 H. 6.12.  
2. 9 E.4.33.  
47. Not to  
make good  
a Release  
made be-  
fore.  
C. 1. b. 5. 18.

urposes, expressed in divers Books, viz.  
to have an Action of Trespass for goods 39 H.6.8.  
taken before Administration committed,<sup>2 Ma.Dyer</sup>  
and to have a Rent growing payable in  
that mean time, &c.

---

What Fees to be paid upon Probate, or  
for Copies of Wills or Inventories.

Per Stat. 21 Hen. 8. Cap. 5.

Where the goods amount not to above five  
pound, onely six pence to the Scribe.

Where they be above five pound, but under  
forty pound, 2 s. 6 d. to the BB. 12 d.  
to the Scribe.

Where above forty pound, to be taken but  
2 s. 6 d. to the BB. 2 s. 6 d. to the  
Scribe, or 1 d. for each ten lines often  
inches long, at the Scribe's choice.

These Sums are to satisfie both for  
Proving, Registering, Sealing, Wri-  
ng, Praising, making of Inventories, gi-  
ng Acquittances, Fines, and all other  
ings concerning the same.

Where Land is given to be sold, neither

the money raised nor the profits thereon shall be accounted as any of the Testator's Goods or Chattels ; saith the Statute.

Note , that the Will is to be brought with Wax thereunto ready to be sealed and proof to be made of the Will , according to common Custom.

For making the Inventory , the Executor is to take or call to him two Creditors or Legatees of the Testator , and does in their presence ; or , in their absence or refusal , two honest persons , being the next of his kin ; or , in their default , two other honest persons .

The Inventory is to be indented , an one part left with the Ordinary , and the other to remain with the Executor .

The Executor is to make Oath for the truth of it .

For a Copy desired by any , either of Will or Inventory , no more is to be paid than before is allowed : for the Registering , with the like election to the Scrip or Register , as is above said .

Mr. *Swinborn* saith , That an Executor is to swear , and if it should be thought fit to be bound to make a true Account , where he shall be thereunto lawfully called

the Ordinary. Of this Account see in page 274. And of Accounting some Books of the Common Law make mention, as 3 Edw. the third, *Fitzherbert Exec.* 91. Where *Trew* saith, that of a thing in Action no Account shall be before the Ordinary ; but *Parn* seems of a contrary opinion. And elsewhere it is said, that where Debtor is made Executor to the Debtee, he shall yet account before the Ordinary for this Débt : yea, as of money in possession, saith one ; which others denied.

See also 31  
E. 3. cap. 11.

An Administrator shall account as an Executor, Fitz. Ex. 91. & 837. viz. 18 E. 2. Tit. Brief.

48 E. 3. 14,  
15. Of a duty resting in account it is said, the Legatee shall have remedy by Account in the Spiritual Court.

18 Ed. 4. f. 3.  
Moyle.

4 H. 7. 15.  
per Wood.

9 Ed. 4. 47.  
Doct. & Stu.

78. b.  
21 E. 4. 22.  
Plowd. Com.

544. 4 H. 7.  
16. Kelw.

Kep. 64. a.

An Executor by wrong shall be drawn to account before the Ordinary, saith *Moyle* Justice. But saith *S. German*, he may not force any to account against the Order of the Common Law ; (not shewing what that is.) And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to doe : *quod non credo.*

Also of the Oath of an Executor divers Books tell, but not to such purpose as *Swinb.* but truly to perform the Will,

## CHAP. V.

*What things shall come unto Executors, and  
be Assets in their hands, and what not.*

**T**H E things which shall come to Executors are of great multiplicity, and would make a large and confused heap tied together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First we will divide them into things Possessory, or actually in the Testator ; and things in Action, or not actually in the Testator. Secondly, the Possessory into Chattels real, and personal ; or (as some less properly express it) movable, and immovable.

*Of Chattels real possessory.*

**T**Hese may be divided into two kinds, viz. living, and not living. The living are not many and various. 1. The Wardship of the body of another (be it by reason of a Tenure of the present Owner, or by Assignment from the King or other Lord of whom the Tenure was) is a Chat-

Chattel real, not personal, though it be  
a interest in the person of another; but  
is in respect of a Tenure of Land or  
her Hereditament, and is for years, *viz.*  
uring the Minority, or till Marriage had,  
nd so is real. Next, a Villain for years (as  
y Grant for a term from him that had  
he Inheritance) is a Chattel real. As for  
n Apprentice for years, it is by Custom,  
s I take it, that he goeth or is derived to  
xecutors: But, for reason after shewed, I  
ink this Interest be not in the reality,  
ut in the personality rather. So of a  
Debtor in Execution for Debt, the Inter-  
est in him, or perhaps more properly in  
is Liberty, is not, as I conceive, (for rea-  
ons which after I shall express) a real,  
but a personal Chattel. The like Law of  
a Prisoner taken in Wars. As for Fishes  
n a Pond, Conies in a Warren, Deer  
n a Park, Pigeons in a Dove-house,  
where the Testator had the Inheritance,  
or but for life, in the Pond, Warren,  
Park and Dove-house, they are not  
Chattels at all, nor to go to the Execu-  
tors, but to the Heir, with the Inheri-  
tance. If the Testator were but a Ter-  
mer, they are to go to the Executor but  
as accessory Chattels, following the state  
of

of their principal, *viz.* the Warren, Park, Dove-house, Pond, &c.

The real Chattels not living are either in Houses or Lands most usually, and that three ways. First, by Lease for years. Secondly, by Wardship of Lands held by Knight's-Service. Thirdly, by Extent upon Judgments, Statutes, or Recognizances; or in things issuing out of Houses or Lands, as Rents, Commons, Eftovers, or such like. But where an Inheritor reserves a Rent upon a Lease for years, this shall not go to the Executor, but to the Heir, with the Reversion, other then Arrearages of it behind at the death of the Testator. Also Commons, Corodies for years, Advowsons, Tithes, Fairs, Markets, Profits of Leets, and such like, which the Testator had for years, all which may accrue any of these ways as the first, are Chattels real. Yea, one simple Presentation to a Church, upon the next Avoidance is a real, and not personal, Chattel, before it come to be void; and what then it is we shall after shew. And the title accrued to the Crown upon Attainder of Felony, where the party held not of the King, *viz.*, the *Annum*, *Diem* & *Vastum*, that is,

is, power not onely to take the profits for a year, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but a Chattel ; and therefore though granted to one and his Heirs by the King, yet shall go to the Executor, and not to the Heir.

*Temp. E. I.  
A. f. size 124.  
Fitz.*

*Some doubtfull or less clear Cases touching  
Chattels real.*

F'irst, where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian who now after the death of the first Guardian shall be next of kin, if the Ward continue under fourteen years old ; else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattel, nor shall go to the Executor, nor to the Heir, but to him who first enters and claims it as an Occupant, if no Assignment be in the life of the Lessee made : Contrarily of a Lease for many years, if three, or more or lesse, so long live, this is a Chattel, and shall go to the Executor. So an Extent upon

*37 A. f. p. II.*

upon a Statute, yet it is delivered to the party as a Free-hold, *viz.* *ut liberum tenementum*; but that onely makes it to be *quasi liberum tenementum* as to the maintaining of an Assise, if wrongfully put out. Where one is seised in the right of his Wife of Land or other Hereditament, and is attainted of Treason or Felony, the profit thereof accruing unto the Crown is but a Chattel; and though the King grant it to one and his Heirs, yet it shall go to his Executors. And if one having a Lease for many years, *viz.* 100, 500, or more or less, doth devise and bequeath the same to *A* and the Heirs males of his body, and for want of such Issue to *B* and the Heirs-males of his body, and dieth, having Issue a Son, the Term shall not go to his Son, but to his Executor or Administrator; for it cannot be made a matter of Inheritance. So if *A* had died without Issue Male, the Term should not have gone or remained to *B*, but to the Executor or Administrator of *A*; as was lately adjudged in the Exchequer between Sir Robert Lewknor and Mrs. *Hammond*. So of an Advowson, or any other Hereditament, granted or devised to one and his Heirs

*4 E.3. Aff.  
166. Bro.  
Chap. 15.*

for

r 100 years : or if such a Termer grant  
Rent out of the Land to *A* and his 39 E.3.37.  
eirs, or the Heirs or Heirs-males of his <sup>So Man-</sup>  
body ; yet shall the same go to the Exe- <sup>wood, if</sup> granted for  
utor , and not to any Heir ; for it being <sup>life, it is but</sup> a Chattel.  
erived out of a Chattel , cannot be any Plow.Com.  
ree-hold or Inheritance, But is it self a <sup>524.</sup>  
ieer Chattel. *Partus sequitur ventrem.*

*Of Chattels personal.*

Personal Chattels, or goods moveable,  
are also in like manner to be divided  
into quick or dead. The quick are  
Cattel of all kinds ; as Sheep, Horses,  
Kine, Bullocks, Swine, Goats, Geese,  
Ducks, Poultry, &c. There may be  
also in living Creatures reasonable an  
interest as in a Chattel personal ; as  
in the person of a man taken in Execution  
for Debt. And this I hold to be in na-  
ture not a real , but a personal Chat-  
tel, (as before was touched) for that Debt  
is the root of it , and the body is but a  
pledge or gage , dischargeable instantly  
upon Payment, Release , or other Dis-  
charge of the Debt. Like Law of a Priso-  
ner taken in the Wars ; for thereof and  
theré-

No. na. br.  
88. Reg. o-  
rig. f. 102.  
There is  
mentioned,  
that the pri-  
soner was to  
have 159 l.  
for his ran-  
sum. Bro. no.  
ca. 295. &  
tit. Property  
28.

i H. 6. c. 5.

therein, as in a Chattel, hath the party  
a legal interest: as appears by a Writ of  
Trespass in that Register for taking  
way a Prisoner, *viz.* *Quare quendam So-*  
*tum Prisonarium suum cepit, &c.* At  
note lately, *viz.* in the time of King He-  
nry the 8th, the King himself, upon the wi-  
ning of *Bullen*, bought divers Prisoners  
his Subjects. And by a Statute in the  
beginning of Hen. the 6. his time the  
Interest in a Prisoner is mentioned  
valuable, and coming from one King up  
to another; therefore, doubtless, shall go  
from Testator to Executor by death; and  
not to be infranchised or freed thereby.  
The interest which one hath in an Appren-  
tice I take to be rather personal  
than real, though for years, because  
not springing out of any real Root, a  
Wardship and Villainage do, but out  
of a meer Contract. As for a Servant  
whose Master is dead, doubtless he is leg-  
ally discharged, and is not Servant ei-  
ther to Heir or Executor: but meet an-  
honest it is that one of them continu-  
him in service, till a fit time of providing  
for him a new Master; and fit for him  
not to depart suddenly.

Now for things personal without life  
these

ese are evident, viz. all Household-stuff, nplements and Utensils, Money, Plate, ewels, Corn, Pulse, Hay, Wood felled and severed from the ground, Wares, merchandize, Carts, Plows, Coaches, addles, and such like moveable things.

*More doubtfull Cases touching things Personal.*

First touching things living. If the Testator had any tame Pigeons, or Deer, or Conies, or Pheasants, or Partridges; these, as well as Chickens, shall go to the Executors: so, though not tame, if they were taken and kept alive in any Room, Cage, or like Receptacle, as Pheasants and Partridges often be; so Fish in Trunk, as also young Pigeons, though not tame, being in the Dove-house, not able to fly out; yet their Dams, the old ones, shall go to the Heir with the Dove-house. And if the Testator had any reclaimed Hawks, they also as Chattels personal shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Grey-hounds and Spaniels be not so commonly bought and sold, nor so anciently have been; yet are they now grown to be

10 E. 4. 14,  
15. Come of wild ones.  
22 H. 7.  
Kew. Rep. f.  
88. 118. Co.  
1. l. 11. f. 50.  
18 H. 8. 2.

10 E. 4. 14,  
15, and 18.  
So of young Hawks in the nest. It is Felony to steal these; ergo, they be goods.

a Merchandise, and why not ? for though they be for the most part things of pleasure, that hindereth not they may be valuable, as well as Instruments of Musick, both tending to delight and exhilarate the spirits ; a cry of Hounds hath, to my sense, more spirit and vivacity then any other Musick. Add here, that there may be some profit and advantage gotten by them, both *quoad adeptum boni, & ademptionem mali*, the getting of some good food, and the preserving of others, as Lambs, Conies, Fife, Poultry, by killing Foxes, wild Cats, all others, which destroy them. And we know that money is recoverable in Damages for taking away such, or a Mast serving to keep an house ; so of Ferrets to catch Conies, &c. Therefore they are valuable. But it may, perhaps, be objected, that none of these above are Cattel, and therefore not repleviable, consequently, no property in them ; for where more then one living Cattel is distrained, the Replevin is to be by the name *Averia*, signifying Cattel. For answer not to insist that one may have property in divers things whereof no Replevin I eth, as Corn or Hay not in Sacks nor Cart.

So an Hunter's Horn, a  
Faulkoner's Lure.

Hares,  
Deer, Phe-  
sants, Par-  
tridges, wild  
Ducks, &c.  
are good  
meat.

Carts, Money not shut in bag nor box, &c. farther say, that even the word *Averia* may be applied to these: for so I find to Hens and Capons in the Book of Entries, viz. in the Writ of *Curia claudenda*, where Fol. 142<sup>b</sup> he Plaintiff complains of the Defendant's not making his Mounds, *per quod Averia ipsius A*, viz. *Capones, Gallinae, & alia Averia ipsius A*, that is, whereby his Cattel, viz. Capons and Hens, and other his Cattel, came into the Plaintiff's house and garden to his damage, &c. And both *Newbert* and *Newdigate* hold that a Writ of Replevin lieth of such things. Though *Brudenel* were of contrary opinion, yet he Hen. 8. f. 3<sup>a</sup> also held an Action of Trespass maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first, to those abroad in the fields. Put the case that a man dies in *July* (before Harvest I mean) seized for life, or in Fee or Tail, in his own right or his wife's, or estated for years of Land in the right of his Wife being sown with Corn or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this shall go to the Executor of the Husband, and not to the Wife or Heir, who shall

G 2 have

Roots of  
Carrots,  
Parsnips,  
Land sown  
whereon is  
ripe Corn.

For he was  
Tenant for  
life in effect.

have the Land, but Hay growing, vi.  
Grasse ready to be cut down, Apples  
Pears, and other Fruit upon the Tree  
shall go to the Wife; as also if they  
had been upon a man's own Land of Inhe-  
ritance, they should go to the Hei-  
though the Corn should go to the Execu-  
tor. The reason of difference is, becau-  
this latter comes not meerly from the  
Soil without the industry and manuranc  
of man, as the other do: and I take Hop  
though not sown, if planted, and Saffrc  
and Hemp, because sown, to pertain to  
Corn to the Executor. All those yet sha-  
pass to one to whom the Land is sold or  
conveyed, if not excepted, though never  
so near reaping, felling, or gathering. Bi-  
what if the Wife had the Lease for year  
as Executor to some former Husband or  
other Friend, and the Husband after sow-  
ing dies? who then shall have the Corn  
Certainly the Corn shall go to the Execu-  
tor of the last Husband, at least so muc  
as is more then the year's value of the  
Land, or the making it up by addition of  
other things; for the value is to be *Asset*  
for payment of Debts and Legacies. Pu-  
the case again, that the Husband and  
Wife were joyn't-tenants of the Land  
thei

hen the very Corn growing shall sur-  
ive to her together with the Land ; and  
though the Husband sowed it, yet shall it  
not go to his Executor. Being in consid-  
eration of things growing on the ground,  
let us not forget to think of Trees sold by

The Wife  
also shall  
have conve-  
nient appa-  
rel. 33 H.6.  
31. 2 Eliz.  
Dyer.

S seised of the Inheritance of the Land  
of *J D*, who dieth before felling ; this  
interest is a Chattel, which shall go to the  
Executor, and not to the Heir of *J D* : but  
some colour may be that these , because  
fixed to the Soil and Free-hold, are real  
Chattels, as the interest in Land is, and  
not personal. So also of Trees excepted  
by him who selleth the Inheritance of  
the Land. But in both Cases I conceive  
his Interest to be personal, and not real ;  
for that, as it is a propriety of Chattel in  
the Vendee or Vendor with excep-  
tion , it stands in consideration severed  
and abstracted from the Soil or Ground  
where the Trees grow , though the  
Trees be not actually severed by the Axe  
from their Mother Earth. But if the Les-  
see for years or life do except the Trees,  
these continue parcel of the Free-hold  
and Inheritance. And after Corn reaped,  
and before Tithe set out , the Inher-  
itor of the Tithe dying , I think the

Co. li. i. f. 48.

Executor, and not the Heir, shall have  
the Tithe after set out.

Now let us come home to the Testator's House, and see in and about it. Some doubt what pertains to the Heir, and what to the Executor. Question has been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rails, Glass in Windows, Tables, Dormants, Wainscots, Doors, Locks, Keys, and such like, to whom these should go, whether to the Heir or Executors. And in the latter end of *Henry* the seventh his time, an Executor taking a Furnace which was set in the middle of a house and not fixed to any Wall, the Heir brought an Action of Trespass against him for so doing; and it was adjudged for the Heir, *viz.* that this was to go as part of the Free-hold and Inheritance to the Heir. And long before, in *Edward* the third his time, it was debated, whether it were Waste in a Lessee to remove or take away a Furnace, or not: But I find no opinion delivered by the Judges. But in the late Queen's time, Justice *Walmsley* said that the Lord *Dyer's* opinion was, that where the Furnace is not fixed to the Wall,

Of Houses,  
or things  
about the  
House, 42 E.  
2. 6.

21 H.7. f.21.

42 E. 3. f.6.

Wall, the Lessee might within his Term  
take it away. Contrarily, if it were fixed  
to the Wall; for then it strengtheneth the  
house. And yet, notwithstanding it might  
be in the one Case so removed by the  
lessee, yet it is not there, as he said, a  
chattel personal or moveable, so as it  
is attachable. And there the Case being,  
that a Clothier, being a Termer of an  
house, had fixed a Copper to the Wall,  
with Looms and Pricks necessary for  
his Occupation; a Judgment being had  
against him, the Sheriff delivered the  
Copper in Execution as a Chattel, and  
after the Lessee took it up, and it was  
taken from him by virtue of the Exe-  
cution: whereupon he brought an Action  
of Trespass, and by all the Judges  
the Action was maintainable. And  
whereas it was found by the Jury, that  
by the Custom of Kent the Lessee might  
remove such a Copper; Justice Beau-  
mont said, that without any Custome a  
Lessee might so doe at any time during his  
Term. But it is to be noted in the said  
Case, that the Furnace was by it self deli-  
vered as a movable Chattel, and not as part  
of the house; for that was not meddled  
withall, nor at all delivered in Extent, (as  
H.37. Eliz.  
Austin's  
Case.

in the Case between *Miles* and *Pra*  
 where both House and Copper were del-  
 vered upon a Statute ) the House belik-  
 being held upon such a rack-rent, as th  
 the party did not desire to have it, for I  
 might have had the whole being a Cha-  
 tel, and so have used the Copper durir  
 the term. And as touching all other fixe  
 things, the Law was taken in the sa-  
 case in *H. 7.* his time to be all one as i  
 the case of the Furnace, *viz.* that the  
 should go to the Heir; save onely that f  
 Glass in the windows, *Pollard* said it wa  
 otherwise, *viz.* that that should go to  
 the Executors, which none there denied  
 But since, in the late Queen's time, it wa  
 otherwise resolved touching Glass, tha  
 it should not go to the Executors, and th  
 like was there said touching Wainscots  
 and so also by the Lord *Anderson* in th  
 said case of *Austin*. And touching Poff  
 fixed, for that they be parcel of th  
 Free-hold, so also of Mill-stones, An-  
 vils, Doors, Keys, Windows, none of thes  
 be Chattels, but parcel of the Free-hold  
 or thereto pertaining, therefore not the  
 Executor's.

Things in  
Gardens.

Now to come to Gardens also  
 whereas I before laid down a difference  
 be-

etwixt things sowed, or not arising from the Earth without manuring, and such as grow of themselves; it will thence be concluded that the Roots of Carrots, parsnips, Turnips, Skerrets, and such like, coming and arising from yearly sowing, must go to the Executor, and not to the Heir; the case being so, that the Gardner and Sower had the Inheritance of the Garden or Soil. Now though in most places this can rarely be a question of value, yet about *London* and some great Towns it may, and therefore is not unworthy of a line or two, a thought or two, the rather, or that the reason of this case may give light touching right in other cases. And, in my opinion, these (notwithstanding there is a sowing and manurance to generate them and cause their being) shall go to the Heir, and not to the Executor. My reason is, for that the thing of profit is the Root which is hidden in the ground, and I hold it no reason, nor agreeable to Law, that the Executor should dig and break the soil and ground to search for her entrails: he is to content himself with that which is above ground, as Melons of all kinds, and the like, whose fruit is above the ground; but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the Soil, therefore they shall go with it to the Heir.

Let us now consider of things, thought not fixed to, yet usually kept in houses, *viz.* Writings and Evidences, whereabout generally no doubt can be, but that they follow the interest of the Land: so as if they touch Inheritance, they pertain to the Heir; if but Terms of years, Goods, Chattels, or Debts, they pertain to the Executor: yea so do Statutes and Bonds in Law, (howsoever otherwise in equity) though they concern the assurance and enjoying of Inheritance purchased. What if *A* mortgage the Inheritance of Lands to *B*, upon condition of redemption by payment of five hundred pound to *B*, his Heir, or Executor, and *B* dieth, the Deeds being delivered into his hands? now the Heir, not the Executor, shall have them: for though the money may be payd to the Executor, yet (meantime) the Land descends to the Heir, nor is there any Debt to the Executor, for *A* may chuse to pay, or not: Put it

on

the other side , that the Land had been  
d for five hundred pound not paid to  
, but a Condition, that if not paid to  
n, his Heir or Executor, by such a day,  
en to re-enter ; and *A* dieth : here is a  
ebt to the Executor, and no Land de-  
ended to the Heir of *A*, yet shall the  
eir have the Deeds , for that a Condi-  
on is descended to him. Question hath  
een touching Boxes and Chests wherein  
e Evidences concerning Inheritance  
e: and although the better opinion in  
ur Books doth pitch upon this diffe-  
nce, that where they are sealed up ,  
ey shall pertain to the Heir , other-  
ise, where not sealed ; I cannot con-  
eive that difference to be grounded on  
ood reason, but rather think that Boxes,  
hich have their very creation to be the  
uses or habitations of Deeds, should,  
; appurtenant to them , go to the  
eir, whether sealed or not. On the  
ther side , Chests made for other uses,  
iz. the keeping of Napery or Ap-  
arel, shall not, as I conceive, be taken  
s appurtenant to Evidences because some  
e in them, for so may other things also  
e : Nor as touching them can sealing be  
f any effect, but rather locking and not

41 E.3.2.  
36 H.6.26.  
18 Ed.3.4.  
3 H.7.15.

*Que.* If sole  
use that way  
make a dif-  
ference or  
not.

locking

locking must make the difference touching them, if any difference by inclosure.

---

## CHAP. VI.

*Of things not actually in the Testator, but  
accruing to the Executors by or after the  
Testator's death.*

**T**Hese be of divers sorts : the first and chief whereof are things gotten and acquired by Action or Suit ; secondly by Condition or Covenant without Suit ; thirdly, by Remainder.

*Of things in Action.*

**T**O speak first of the first , it is clear that Debts due to the Testator, be it by Bond, Statute, or Judgement, or for Arrerages of Rent , are not *Assets* to charge the Executor untill receipt of them : and it is clear that the Action to recover these doth pertain to the Executor , and that the Debt and dammages recovered shall be *Assets* to charge the Executor. So also of Actions of *Detinue* and

of

f Covenant for any thing personal, or a-  
y Chattel real, Lease, Wardship, or the  
ke. But perhaps some will doubt of  
Covenant touching Inheritance, *viz.* the  
urance of Lands, or enjoying thereof  
ee from this or that incumbrance, or the  
ke: Yet even in those cases, if the Co-  
enant were broken in the Testator's life-  
me, I think clearly the Action is ac-  
rued to the Executor, for that his Testa-  
tor was to recover damages in the Action  
of Covenant for that breach; and he be-  
ing intitled to these damages as princi-  
al, and not any accessory thing in that  
Action, the Law hath cast that Action upon  
the Executor. And that is the cause why,  
f Waste be committed in the life of the  
Lessor by his Lessee, and then the Lessor  
dieth, his Heir can have no Action for  
his Waste, *viz.* because he cannot recov-  
er the treble damage; so neither can the  
Executor have it, for that he cannot recov-  
er *locum vastatum*, the place wasted, the  
inheritance whereof is in the Heir.

That the Executor at the Common  
Law could not maintain an Action of  
Trespass for goods of his Testator taken  
away in his life-time, seems to be impli-  
ed by the Statute in the time of K. Edward

11 H.4.32.  
45 E. 3. 3.  
No. na. br. 59.  
4 E.3. c.7.

the

And the like given to Executors of Executors per Stat. 25 E. 3. c. 5. 17 E. 3. fit. 106. the third, which gives such Action. Y it seems that a Replevin was maintaiable by the Executor, at least in some cases, for goods taken or distrained in the Testator's life-time. But in case the distresses were for Rent or Service, it is said a little after the making of that Statute that the Lord may not now avow for his Rent or Service, because his Tenant is dead, but must set forth the matter, whereupon justify to excuse himself from answering damages ; and the Executor shall by this Action recover the Catt or Goods, and that by the Common Law saith the Book, though the Statute of Marlebridge had never been made, for that the propriety remained in the Testator. Note, it speaks not at all of the said Statute of 4 Edward the third. By Newton in the time of King Henry the eighth he would have it, that the Executor in this case should not have a Replevin, but an Action of Trespass grounded upon the said Statute, viz. 4 Edw. 3. which may be thought cannot be by any means, by reason of the Statute of Marlebridge, cap. Non ideo puniatur dominus, &c. for the Executor, as well as his Testator, is thereby restrained, as I think, from the Action.

*c. 21. meant,  
ut credo.  
21 H. 6. 1.  
But Mark-  
ham. è con-  
tra.*

*21 H. 8. c. 19.  
4. E. 3.*

of Trespass against the Lord. As for  
that no Avowry can be made upon the  
tenant, that is now remedied by a late  
statute. The other Statute hath been ta-  
ken to extend to other things then goods  
oveable : for where a Church becom-  
g void, a stranger presented thereun-  
wrongfully, and the Patron died; it was  
resolved in the late Queen's time, that  
the Executor might by the equity of the  
old Statute maintain a *Quare impedit.*  
But whether an Action of Trespass lieth  
against an Executor against him who spoiled  
the Testator's Corn, Grass, or Wood  
rowing, hath been questioned, but no-  
where resolved to my knowledge. I  
ink it may lie with some difference.  
First, for that the Statute of 4 Edward  
the third doth not onely speak of  
goods carried away, as limiting the  
law to that Trespass solely and particu-  
lly, but speaks generally of Trespass  
one to Testators; and then brings in  
that particular of goods, as one Instance.  
Now there be many Cases of instances  
ensamples given in Acts of Parlia-  
ment, which yet do not restrain the  
Redemption or Purview to that particular, or  
from extending to other Cases of like na-  
ture.

The B. of  
*Coven. & L.*

and *Sale's*  
*Case M. 32*

& 33 *Eli. in*  
*com. ba. So of*

*Ravish-*  
*ment. Pl.*

*gard. 7 H. 4.*

2. & 7 H. 4.

6. *Eject.*

*Firm. & Tild.*

*De clauso*  
*fracto*

meerly it li-  
eth not.

11 H. 4. 3.  
This Periam  
Just. did ve-  
ry judici-  
ously urge in

*Sale's Case*

*supra.*

ture. Thirdly, the Stat. speaks of Trespass remaining unpunished, which it meant redresse : But it should still leave man unpunished, if it should have no larg extent then to that one singular Tres passe of Goods taken away, *viz.* mov ables. Again, the Testator was clear intituled to a recovery of dammages f this other Trespass, which if he had r covered, should have come to his Ex cutor : Yea, the things themselves, all felled in the Testator's life, and pa though not felled, should have come the Executor; therefore also the damn ges recoverable in lieu thereof, out which ( recovered) the Debts and Leg cies of the Testator are to be satisfie Beside, this Action of Trespass is a thi severed from the state of the Land, so if the owner thereof had, after this Tre pās done, alienēd the Land, yet h not this Action remained to him, as take it clearly. And why not, as well where a Trespass is done upon Lands of the Lessee, and then the te expires? this doubtless doth not take way his Action, nor his Executor's. E methinks here may be some difference probably taken: as first, between a Tre

pss in destroying or taking away Corn growing , and a Trespass in Grass or Wood growing. For the first being of that nature, as that, though the Owner had a state of Inheritance in the Land whereon it groweth , and should have died before severance and felling , yet it should have gone to the Executor , and not with the Land to the Heir ; therefore doubtless doth the Action for destroying or taking away thereof accrue by the operation of Law to the Executor , in lieu of the thing taken or destroyed. Otherwise , perhaps , of Wood or Grass , which by the Owner's death should have gone to the Heir , and not to the Executor . And yet here again another difference , methinks , may be betwixt Grass and Grass , *viz.* betwixt that in Pasture and that in Meadow ; yearly mowed and turned into Hay , not left to be consumed by the mouths of Beasts , as that growing in Pasture : For as the Law distinguisheth between these Soils , it gives precedence to Meadow , and makes it waste for a Lessee to plow it up , not so for Pasture . Yea , Tithe is paid of Hay , but not of Grass growing in Pastures : so the Meadow-grass , being in the Owner's pur-

pose and intention as a thing severe from the Soil, should, methinks, so be all in the eye and estimation of the Law, and therefore stand in a different state and account from Pasture-grass.

A third difference may be in the manner of the Trespass, *viz.* Where Meadow grass is eaten up with Cattel by a Trespasser, and where by him mowed and carried away as Hay : for in this latter case an Action of *Trever* and *Conversion* for so many Loads of Hay is doubtless maintainable by the Executor ; though it should be admitted that in the other case, of consumption by the mouths of Beasts without severance, no Action should be maintainable by the Executor ; which yet I admit not, but think the contrary probable.

For when Meadow-ground, which yearly conceiveth, (*Sol sine homine generat herbam*) shall be ready to be delivered of her burthen, if a stranger put in a herd of Cattel, which swallow up and tread down this fruit of her Womb before the Mower with his Sithe come as a Midwife to help her delivery, if then by the hasty death of the Owner, before Action brought, this great Trespass should be disipunishable, it were

*At least, methinks, Action upon the Case here and before should be maintainable.*

ere contrary, as methinks, to the purpose of the said Statute, and a great defect in the Law.

Yet here, perhaps, touching this a  
urth difference may be or arise out of  
e time of the death of the Owner, *viz.*  
here he dieth before time of Mowing,  
id where not; for *dato* that in the  
rmer case, because, if such destructi-  
on or consumption had not been, yet  
he Owner dying before severance, this  
ould not have come to the Executor, but  
ave gone with the Soil to the Heir, that  
erefore the Executor, who is not dam-  
fied, should recover no damages: yet  
i the other case, the Owner living till  
ter Hay-time clearly passed, *viz.* till  
ie end of *August*, methinks now, since  
is fruit of the Meadow's Womb  
ould have been a Chattel severed, had  
t this Trespasser made unlawfull pre-  
ention; therefore the Executor, to  
hom the same should have come to-  
wards the performance of the Will,  
ould have, out of the said Statute, an  
ction and remedy reached unto him, to  
cover recompence in damages for this  
rong done *in retardationem Executionis*  
*testamenti.*

A fifth and last difference may perhaps be in the state of the Owner : for *Posito* that where the Land is his Freehold or Copyhold Inheritance, no Action should be given to his Executor for Wood or Grass taken or destroyed in his lifetime ; yet where he is but Tenant for years, Gardian, or Tenant by Extent, so as the very state in the Land was to come and is come to the Executor , ( together with *quicquid plantatur solo* ) methinks the Executor should have , together with the state in the Soil, the Action to punish the Robber of or Trespasser upon the Soil. Thus having scanned and sifted , to the best of my ability , all differences and circumstances of this Point , how far I am wide and wherein right *Aliorum si judicium*, or rather, *Altioris esto judicii*

*3 H. 6. 3.*  
Littleton, fo.  
*42. a.*  
So held in  
Sale's Case  
of damma-  
ges in Qua.  
impd. re-  
covered.  
*Contr. of the*  
Present-  
ment, Re-  
leasing.  
*13 E. 3.*  
*T. 91.*

But this is clear, that wheresoever Executors do recover any damages for Trespass or other wrong done to their Testator, the mony recovered ( at least if Execution be had, or mony received ) will be *Assests* in their hands, as well as Debts recovered upon Bonds, or Bills, or Lands b: them taken in Extent upon Statutes, Recognizances, or Judgments. Yea, without ever having these moneys, Executors ma mak

make them *Assets* in their hands, *viz.* by making Releases or Acquittances, or acknowledgment of Satisfaction; for this amounteth to a Receipt, and chargeth the Executors towards the Creditors with the whole penal sum, though haply they receive but part, as the principal, or some like proportion.

Therefore there is great caution to be used by Executors in this kind, that unless they be sure they have Goods sufficient to pay all Debts and Legacies, they make no Release, Acquittance, or Acknowledgment of satisfaction, for more then they receive, e it Debt or Dammages.

And the like caution is to be used by them touching submission of Debts or damages to Arbitrement, whereby discharges of the same may grow: for the submission to the Arbitrement being their voluntary act, although the Arbitrators by their judgment do discharge the Debt or damage in part, or in whole; yet shall the Creditors have like remedy thereupon against the Executors as if they had released, or, which is more, received the same.

Other Actions there be of Discharge, which as the Testator himself in his life-

Error 13 H.

4. 6.

46 E. 3.

Yet upon a

Verdict in

Quare im-

ped. the

Wife, not

the Execu-

tor of the

Husband,

did seize.

time might have had, so may his Executor after his death, *viz.* Writs of Error Attaint, Disceit, *Audita Querela*, *Identitate nominis*. But this last is given by Statute. Whatsoever is regained by any of these ways as unduly lost by the Testator, shall also be *Assets*.

### Special Cases pertinent to the Premisses.

1. *Chattels come to the Executors from the Testators, yet not Assets.*
2. *Assets which be no Chattels.*
3. *Things in Action, and in the Personality turned into Chattels real, &c contra.*

**A**S to the first, I exemplifie thus : *A* makes *B* his Executor, and dies ; makes *C* his Executor, and dies : the Goods left by *A* to *B* as Executor if exceed his Debts and Legacies. Or let suppose no Debts nor Legacies of *A*, and that *B* dieth much in debt above the Goods he leaveth, and did make no alteration of the property of the Goods of *A*, but meerly left them to *C* his Executor.

How shall not the Goods which came to  
as Executor of *A*, and so from *B* to *C*, be  
able in Law to pay the Debts of *B*: yet  
Conscience methinks they should, and  
*C* should not receive them to his own  
use, as in Law he may, where *A* left no  
Debts. But if *A*, making *B* Executor, did  
so by his Will give him all his Goods,  
and he in his life-time made election to  
have them as Legatee, or by his Will did  
dispose of them, or appoint them to go,  
to the Goods he had as Executor; they  
ould not be otherwise given or disposed.  
Now by this election they were altered  
in property from being his as Executor,  
and so as his own Goods should be liable  
to his Debts. But things in Action could  
not be so given or disposed, *viz.* Debts,  
*&c.* Yet if *D* were indebted to *A* one  
hundred pound, and *B* his Executor took  
new Bond of him, or another for it, giving  
up the old Bond; now was it become his  
own Debt, and so shall stand in his Exe-  
cutor.

Another instance of this, thus: If *A*,  
Patron of the Church of *D*, grant to *B* the  
next Avoidance, the Church becomes  
void, *A* dies before he presents, his  
Executor presents; and hath the benefit

Or if a  
stranger su-  
surp in his  
life, and be  
dying, his  
Executor

recovers in  
a Qua. imp.  
as by Sale  
was done  
*infra. Mich.*  
32 & 33 E-  
liz. So held  
in Sale's  
Case, in com.  
ban. Vendere  
emeras *ipse*  
jure posset,  
prium.

of preferring his Son or Friend ; yet shall  
this make no *Assets* in his hands for pay-  
ment of Debts , for that he could no  
lawfully take money to present. But if  
*B* had died before the Church had be-  
come void , then, because the Executo-  
r might lawfully have sold it , the value  
should be *Assets* in his hands , as I con-  
ceive ; except perhaps the Incumbent had  
died so hastily after *B* , that the Executor  
had not time convenient to find out  
Chapman and to sell it.

If in the other Case a stranger had pre-  
sented, and got his Clark admitted, and  
the Executors of *B* had in a Qua. imp.  
recovered damages; the mony so recov-  
ered should have been *Assets*. Thus much  
of the first, viz. that some things of the na-  
ture of Chattels may come to Executors,  
and yet not be *Assets*.

Touching the second, viz. that some  
things may be *Assets* in the hands of Exe-  
cutors which yet are no Chattels , I  
shall give but two instances. First,

22 H.8. Br.  
*Villeinage*  
46. If he die,  
how shall  
this be *As-*  
*sets* in the  
Heir?

where a man leaveth a Villain for years  
to his Executors , and the Villain pur-  
chaseth Land in Fee-simple, and the Ex-  
ecutor entreth into the Land ; now h<sup>t</sup>  
he Fee-simple therein , and this Lar<sup>is</sup>  
*Assets*

*sets for payment of the Testator's debts. So if a man by his Will give lands in Fee to his Executors, to be sold for performance of his Will; these before the money thereby raised) are Assets both for payment of Debts and Legacies.* But if the Lands had been given to be sold only for payment of debts, they should only be *Assets* for that purpose, and not for payment of legacies: and so if it were expressly to be for payment of Legacies singularly, this should not be *Assets* for debts, as I take it. For since these are not *Assets* of their own nature, but so made by the Will and disposition of the testator; methinks they cannot be otherwise nor farther *Assets* than as the testator hath willed and disposed. But though Lands thus given were *Assets* before the Stat. 21 Hen.8. cap. 5. yet how can it be so, since the very words of the statute be, that if one do will by his Testament or last Will any Lands, &c. to be sold, neither the money thereof coming nor the profits taken shall be accounted as any of the Goods or Chattels of the Testator's; which I conceive to be all one as to say, that they should not be *Assets* for

3 H.3.63.  
and so 2 H.  
4.21. If by  
Feoffment.  
Per Mark-  
ham cap.  
*Just. con.*  
*Rickhill.*

See 9 Eliz.  
Dyer 234.

for when an Executor denieth himself  
*9 H.D. 264.* have *Assets*, the form of his Plea is  
*14 H.D. 35.* *Quod nulla habet bona nec catalla, &c.*  
 Yet since that Statute, viz. in the late  
 Queen's time, the Law was twice admitted or conceived still to be according  
 to the third of Hen. 6. viz. that the Lands devised to be sold, or the money there  
 coming, should be *Assets*. Indeed in neither of those Books is there any mention  
 of the clause in the said Statute; and it is possible that it might be forgotten  
 as in other Cases sometimes hath happened. But casting about how to reconcile  
 those Books with the said Statute, and not to suppose the same forgotten at bot  
 times, both at the Barre and Bench (though, being but a short clause in  
 the middle of a large Statute to other purpose, it might well so have been  
 at the last, though not hastily, I grew to conceive, that the said Clause being in an  
 Act which limiteth the Fees of Ordinaries, and their Scribes, according to the  
 value of the Goods of the deceased, and then bringeth in this Clause, that the  
 Lands willed to be sold shall not be accounted as any of the Goods, &c. the  
 Parliament meant thereby onely to exclude

ide them to this purpose , that they  
ould not be accounted as part of the  
oods in the valuation , according to  
hich the said Fees were to be rated : and  
ough the words be general , that they  
all not be accounted as any of the  
oods, &c, yet is it the more probable  
at the Parl. intended no farther then as  
foresaid , because that Clause after the  
ees limited in answerableness to the  
values is brought in by a *Proviso, viz.* Pro-  
ided always , that if the deceased will-  
d any Lands to be sold , the money nor  
profits shall not, &c. And thus perhaps  
it was understood and construed in the  
aid late Queen's time ; though no men-  
tion be of any remembrance of that Clause  
or Provision in either of those Cases re-  
ported by the Lord *Dyer.*

As for the third , *viz.* the changing of  
things out of the Personality into the Re-  
alty , & *è contra*, I shew it thus : If a  
Debt were due to the Executor as Exe-  
cutor, by Statute , Recognizance , or  
Judgment , and he sue Execution , and  
have Land of the Debtor's in Extent ; now  
is the personal duty turned into a Chat-  
tel real. On the other side, if such an E-  
state by Extent , or a Lease for years  
mortga-

mortgaged, come to an Executor, and th  
Debtor or Mortgager payeth the mone  
due; now are these real Chattels turne  
into *Assets* personal.

*Another special Case of Equity opposing Law*

**I**F *A* be bound to *B* by Bond, Statute o  
Recognizance, for assurance of Land, &  
dieth, and the Land descends to his Heir;  
or be it that *B* sold the Land to *C*, and  
assigned to him the Bond, Statute, &c. yet  
must the Suit or taking out be in the name  
of the Executor of *B*, and neither of the  
Heir nor Assignee. And that which is re-  
covered or gotten in Extent will be *Assets*  
in Law to charge the Executor, as I take it;  
yet in Equity it pertains to the Heir or As-  
signee. *Quare*, if the Executor meddle  
not, but onely suffer his name to be used.

*Of things come to Executors by Condition.*

**F**IRST, we will consider of Conditions  
bringing back to Executors Goods or  
Chattels granted away by their Testa-  
tors. Touching which there is no doubt,  
but if the Condition be any other then  
for payment of money, or other things

valuable by the Testator or his Executor, Note Diff. th' Chattels returning to the Executor are  
sets in his hands : as put the Case a  
Case for years, Horses, Sheep, Plate, or  
other Chattel , were granted by the Te-  
stator to *A*, upon condition that if *A*  
do not pay such a summe of money or  
do such other act as the Testator ap-  
pinteth, &c. and this Condition is not per-  
formed after the Testator's death ; now is  
the Chattel come back to the Executor,  
ad his *Assets*. But the question hath  
been, ( and perhaps may be ) where the  
Condition is, that the Testator or his Exe-  
cutors shall pay the money to make void  
the Grant, and accordingly the Executor  
after the Testator's death payeth the  
summe out of his own purse , not ha-  
ving any money of the Testator's in his  
hands : in this Case coming in question  
*impore Hen. 7.* it was resolved at the last,  
at this redeemed Chattel should not be  
*Assets*, but be to the Executor as his  
vn proper Goods; though at the first  
three Judges were of contrary opinion,  
iz. that the Goods redeemed should  
be in the Executor as Goods of the  
testator. And truly I must confess,  
that I cannot yet finde good satisfacti-  
on

21 *Hen. 7.*

on in that Book's resolution, except we shall take the Case there to be such that which is put and reported by the Lord *Dyer*, *tempore Hen. 8.* viz. that the money paid for redemption was as much as the full value of the Goods pledged or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare if any should lend money upon a Mortgage where the thing mortgaged is not of better value than the money lent; rare also that an Executor should take care to redeem with his own money that which should yield no benefit or advantage to him, or his Testator. Let us therefore scan and examine the Point, since the same may come frequently in use: and this we may the more decently do, because the Lord *Dyer* in the Margent of the Case by him reported, as aforesaid saith expressly, that the said other *temp. Henry* the seventh was not at all adjudged, himself having viewed the Roll which he there sets down, and the name of the parties. We will therefore put the Case thus: *A* possessed of a Lease for sixty years of one hundred pounds

Land.

had mortgageth it for five hundred  
ond ; or be it that the Mortgage or  
dge be of a Jewel or piece of Plate  
half the value ; and now before the  
a limited for payment and redempti-  
*A*, having made *B* his Executor, dieth,  
*B* at the time and place maketh  
ament as was conditioned : Now the  
stion is, whether this Lease, Plate, or  
vel, being worth much more then the  
for which it was mortgaged , shall  
ein him wholly in his own right and  
his own use, or partly, if not wholly,  
Executor to *A*, so as to be subject to  
payment of Debts and Legacies.  
re it must be clearly admitted, that  
was enabled to this redemption one-  
and meerly by the Condition an-  
ced to the Mortgage or Pledging.  
must also be admitted , that this  
dition, and the power or interest to  
benefit thereof, came to him and  
derived onely as Executor of *A*. This  
ng premised, it must needs follow, ( as  
one it seems ) that the Condition wor-  
ing and having his operation in the re-  
sption to destroy the Grant, Mort-  
ae, or Pledging , it must needs make  
the things again the Testator's Goods *in*  
*statu*

*tu quo prius*, and so to be in *R* as Executor; since in that right onely he intituled to take benefit of the Condition. For what is it which hindered, before this, from being the Testator's Good? nothing certainly but onely the force and strength of the Mortgage or Pledge. Now by the Redemption that is become void, and hath lost its force; therefor the property of these things must needs be as if no such Mortgage or Pledge had been, or as if it had never first been void and of no force. Thus must the Condition work him who made it, *viz.* *A* the Testator: and those of the contrary opinion in the time of King *Henry* seventh do yet say, that by this Redemption the Testator is so much indebted to the Executor as he disbursed for the Redemption; which could stand with no reason, unless by it the property and Interest should be reduced to the Testator's behoof. That thus it is, also proved, as to me it seems, by Case of Mortgage of Inheritance, upon which the Heir making payment, according to the Condition, is not now to be in as a new Purchaser, but as He

as he shall have his Age, and be inward even for this Land; yea, it shall be *Assets* in his hands for satisfaction of his Father's, as other Ancestors Debts: which in some respect is a harder Case than that of the Executor; for he hath means to satisfie himself of the money disbursed, either out of the thing redeemed, or other goods of his Testator, but the Heir hath no such means. Yet it will be asked, how the Executor can be free from mischief: for if this thing redeem'd be intire, as the Cup or the Lease, the hole will be taken in Execution for the Testator's Debt. To admit this, yet here is one clear way of remedy, *viz.* The Executor may before such Execution sell the thing, and so pay himself, and retain the Surplusage to the Testator's use; and the like of this is frequent in use, *viz.* for Executors to pay off the Testator's Debt with their own money, and to make themselves satisfaction out of the Testator's goods. Besides, it is not impossible that this redeem'd thing should be thus in interest parted, that answerably and proportionably to the Sum disbursed for redemption, with reference to the value of the thing redeemed, a moyety,

or third part, or three parts thereof, shoul  
be to the Executor in his own right, as h  
own proper Goods, and the rest in him  
Executor. As *posito* that *A* and *B* wer  
Tenants in common of such an entir  
Chattel: *A* maketh *B* his Executor, an  
dieth. Now hath *B* one moiety as Exe  
cutor, and another as his own proper  
and upon a Judgment against him as Exe  
cutor, that moiety onely which he hath:  
Executor must be taken in Executio  
And here may be remembred, how in Exe  
cution of a Judgment, or levying of a  
Amerciament out of an intire Chattel  
more value then the Sum to be levied  
the whole is to be sold, and the Surplu  
sage above the Debt or Amerciament i  
to be delivered back to the Owner. Fo  
in all this debate we must presume th  
thing redeemed by the Executor to b  
of better value then the Sum paid, ell  
we may easilly admit the whole to the Exe  
cutor.

Again, the Lease for years is not so in  
tire a thing, I mean the Land let, but tha  
thereof Partition may be made, yea, in  
forced by Action, between Joint-tenant  
and Tenants in common. But here will  
be objected the Case of Redemption by  
the

the Daughter and Heir, who though she hath a Brother born after, so as now she is no longer Heir, yet she shall, as the Law saith, retain the Land redeemed from the Heir as a Perquisite or Purchase. for this, (which I will not oppose) the Law so frameth to the favour of the daughter, because of great mischief to her, if, being stripped of the rest of the inheritance by the birth of a Brother, she should also lose that which her money had redeemed, without having any ready to have her money again or any recompence for it. But in the other Case there is no such mischief, for that the Executor may pay himself, as hath beenewed.

Now on the other side, if the Case shall be understood that the Redemption as by payment after the day, then will easily admit that the property or interest is in the Executor to his own use; that the Condition now having no power to reduce it back, or to operate any thing, it is rather a Re-emption than a Redemption, since it was at the Will of the Mortgagee to dispose it at his pleasure; and any Stranger, as well as the Executor, might thus have redeemed,

med, *viz.* repurchased it : therefore onely Equity, and not Law, in that Case can make any part of the value *Assets* in his hands. And so also, I think, if we shoule admit in the other Case of payment at the day that the property of the Chattel is to the Executor as his own , and not his Testator's goods, no part of Surplusage o value can in Law be *Assets*, howsoever it Equity.

Lastly, if the Executor redeem by payment at the day with the Testator's own money or goods, none will doubt but that the thing redeemed is in him as Executor, and the money by him paid for Redemption is well Administred , the goods redeemed being of better value. But this way it makes no difference whether the whole value of the goods redeemed shall be held *Assets*, and the money paid for Redemption stand drowned therein ; or that that Sum be still adjudged in the hands of the Executor as *Assets*, and onely the Surplusage of the thing redeemed over and above the Sum paid for Redemption.

ings accrued by Covenant or Assumption.

If *A* covenants with *B* to make him a Lease of such or such Land by such a day, and *B* dieth before the day, and before any Lease made; now must *A* make the Lease to the Executor of *B*, ad the Lease so made to him shall be in his as Executor, and consequently as Assets. This is proved by the Judgment in the Case between Chapman and Hilton in the late Queen's time. Yet I confess that it is not expressed in the Resolution of this Case that this Lease should be Assets, but that the Executors should have the Term as Executors, which implieth as much in my understanding; and the Declaration whereupon the Defendant demurreth sets forth the each of that Covenant to be *in retardatione executionis Testamenti*; so as the damages thereupon recovered, viz. 330*l*, were Assets, and consequently also should the Term have bin in lieu and recompence hereof these Damages were given. The Law, if *A* assume upon good consideration to deliver in to *B* by such a day 3 quarters of Malt, or so many Loads of

Plow.Com.

Coals or Wood, or any other Wares & Merchandise, and this is not performe in the life of *B*, but after to his Executor ; it shali be to him as Executor, and shall be *Assets* in his hands, as well as the money recovered in damages for not performing should have been.

*Of things accrued by Remainder or Increase.*

If a Lease be made to one for life, the Remainder to his Executors for years and he dieth ; this will be *Assets* in the hands of his Executors, though it were never in the Testator, as was in the latter end of the late Queen's time resolve by three Justices , the Lord Anders only being of a contrary opinion : and there it was said that *Cranmer's Case* wherein the contrary in effect was resolved, was of little Authority, for that there were first two Judges against two, till after *Mounson* changed his opinion, upon conceit that there the Estate was by way of use, which could make no difference Like Law, where a Lease for years is by Will bequeathed to *A* for life, and after to *B*, who dieth before *A* ; although *B* ne-

had his term in him so as that he could grant or dispose it, yet shall it rest in his Executor as his Goods, and be *Assets*. As for a Remainder for years so in the Testator that he might grant or dispose it at his pleasure, no doubt can be thereof; though the same fell not in possession to the Testator in his life-time, yet no scruple nor doubt can be but that this is *Assets* to the Executor, even whilst it continues a Remainder, and before it falleth into possession, because it is presently valuable and vendible.

Nor much of other nature to these are there Cases where the Executor merchandizing with the Goods of his Testator maketh gain thereof.

So if the Sheep or other Cattel of the Testator do breed, *viz.* bear Lambs, Calves, Colts, &c. after the Testator's death, even these which were never in the Testator shall yet be *Assets*; and the Wool growing upon the Sheep after the Testator's death. But there is one Case worth the consideration, and worthy of some doubt, as I think, and that is this: One leaveth to the Executor a Lease for years of Land worth 20 pound by the year, and the Executor,

11 H.6.35.  
per Babing-  
ton.

keeping this in his own hands one year after the Testator's death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound shall be *Assets*, or onely twenty pound. And the Case, simply thus put, shall be understood of an occupying and manuring without any stock of the Testator's; and therif the Executor did stock it with his own Sheep or other Cattel, as he must have born the losse by rot or death, so is it reason that, if the Manurance prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his industry, skill, and good Husbandry. But if the Testator's stock of Sheep and Cattel were (as of necessity, or for the better advantage of the Testator's Estate) continued upon the Lease-Land, then is it reason that the gain or losse, wheresoever of them God sendeth, do redound to the Testator's Estate. Like Law (as I think) if an Executor, finding that he cannot instantly after the Testator's death let the Lease, I, and near the value, shall therefore buy seed-Corn, and hire the Plowing &c. But it may be said, that the Lease hath one entire valuation at the first upon the

Appraise-

Appraisement. To this I answer, first, that the value upon the Appraisement is not binding, nor much respected at the Common Law: if it be too high, it shall not prejudice the Executor; if too low, shall not advantage him: but the very value found by Jury, when it comes in question whether the Executor have fully Administered, or have *Assets* or not, is that which is binding. Next I say, that if a long time come to Executors of Land worth a hundred pound by the year, and no sale made thereof by the space of a year or more; now the term continuing of the like value as at first, it is no reason but is hundred pound raised the first year should go towards the payment of Debts and Legacies, rather then any of them should be unpay'd. These things, I mean the knowledge of them, are usefull two ways, *viz.* First, to give light to Executors, to discern what unto them of right pertains: Next, to shew unto Creditors and Legatees what, and how far, things shall be *Assets*, that is to say, Goods to enable, charge, and bind Executors to pay Debts and Legacies. For whatsoever any of these ways cometh to the Executors from their Testator, or is

is recovered by any of these Actions, sh  
be in their hands *Assets*, the cost a  
charges of recovering deducted.

---

## CHAP. VII.

*What manner of Interest an Executor hath in his Testator's Goods and Chattels, and how different from the common Interest which they or others have in their own proper Goods.*

**T**H E Interest which an Executor hath (as Executor) in the Goods of his Testator is much different from the absolute, proper and ordinary Interest which every one hath in his own proper Goods, as may well appear in and by these Points. First, Although a Stranger take away these goods, the Action of Trespass for the Executor is of general form, *Quare bona sua cepit*, calling them his Goods; whereas a man outlawed in Debt, &c. or convict or attainted of Felony or Treason, forfeiteth all his own Goods, yet these which he hath as Executor shall not be forfeited. If a Villain be made Executor, his Lord can-  
not

take these Goods, though he may take  
the Villain's own Goods: and for ta-  
king such goods, or for a Debt due to the  
Testator, a Villain may sue his Lord.  
N<sup>y</sup>, if the Executor grant all his goods,  
the good opinion hath been, that these  
which he hath as Executor should not  
pass; yea the Lord *Dyer* so held in the  
Queen's time, with this difference,  
Where the Grantor is named Exe-  
cutor in the Grant, there the goods which  
hath as Executor should passe; but o-  
therwise, if he be not named Executor  
in the Grant. And that this opinion is  
probable, will farther appear by that which  
followeth.

Secondly, The Executor cannot by  
Will give or bequeath the Goods he hath  
as Executor; and if he die intestate, and  
the administration of all his Goods is com-  
mitted to *F D*, yet hath he nothing to doe  
with the goods which the Intestate had  
as Executor to his Testator: Thus *all his*  
*goods* reacheth not to his goods as Execu-  
tor.

Thirdly, Whereas a man's goods stand  
able to the payment of his Debts both  
in his life-time and after; the goods which  
man hath as Executor are not to be taken

Lit. tit. Vil-  
leinage 41,  
42. 10 E. 4.  
f. 1. Yet  
39 H. 6. f. 15.  
A release of  
all Actions  
by an Exe-  
cutor ex-  
tinguishes Actions  
as Exe-  
cutor. But  
Frowick is  
against it in  
26 Hen. 7.  
Kel. 64.

See these so  
resolved in  
Pl. Com. 5.  
25. inter  
Bransby &  
Grantham,  
P. 20 Eliz.

taken in Execution for his own Debt either upon a Recognizance, Statute, or Judgment had against him. And if such a one die indebted, leaving to his Executor much goods which he had as Executor; these are not *Assets* in his hands, able to the payment of his Debts, but only for the payment of the first Testator's Debts or Legacies. Therefore *Quo minus* brought by an Executor, shewing that he was not able to pay the King's Debt because the Defendant detained from him an hundred pound, which he owed him as Executor to *J S*, was overthrown; for that it could not be intended, saith the Book, that the King's Debt could be satisfied with that which the Plaintiff should recover and receive a Executor. Whereas a Woman being possessed of any Chattels personal, *viz.* moveable goods, all are devested out of her into her Husband by her Marriage, so as if he die, and she over-live, they be no her's again, but her Husband's Executor or Administrators; and if she die, all be the Husband's, without being Executor to his Wife. It is not so of the goods which she hath as Executor; these still remain in and to her, if her Husband die: and

she her self die, for that she hath them it were in another's right, *viz.* as she presents the person of her Testator, her husband shall not have them, if he be not his Wife's Executor, and so Executor her Testator.

Lastly, Whereas the Writ of Trespass seems to make no difference between ie's own goods and those he hath as Executor, that being a possessory Action : Suit grounded upon the Possession ; et come to an Action of Debt, which more tastes and participates of the right, and there are they differenced : for here for my own Debt, when I sue, the Writ saith, *Debet & detinet*, *viz.* that the defendant owes me and detains from me that Summe ; yet when I sue as Executor, the Writ saith not *Debet*, he doth owe me, but *Detinet* onely, he detains from me, as admitting that he is not Debtor to me, though he should pay me. And so where I am sued as Executor, the Writ makes me not a Debtor, but a Detainer ; otherwise, where in my own right I owe, and I am sued for a Debt. Accordingly, where Judgment in an Action of Debt is given against one as Executor, it is not generally that the Plaintiff

This may be  
in his name  
onely out of  
whose pos-  
session the  
goods were  
taken.

Co. L. 5. f. 31.

shall

shall recover against him, but he shal recover of the goods of the Testator; and therefore upon this Judgment no *Capias* lieth against him, to inforce him to pay by Arrest of his Body, because he is not properly Debtor. But if after it be returned, that he hath wasted the Testator's goods out of which the said Debt shoul be satisfied, then, he having made himself a Debtor, a *Capias ad satisfaciendum* shal be awarded against him, and then he shal be taken in Execution. So also in some Cases of false Plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiff may have a *Capias ad satisfaciendum*; and that Judgment is in divers Cases for the Damages, although not in money for the Principal. As for the *Capias* before Judgment, in the mean Process against an Executor, that is because of his Contumacy in not appearing upon the former Process.

The reason of this different Interest between an Executor and another, or between the same man's having Goods Executor and others in his own right, as also of the different manner of one being indebted as Executor and otherwise in his own right, is well express'd

the Lord *Cook* in *Pinchon's Case*, viz.  
1st, that the Goods which one hath as  
Executor he hath not in his own right,  
but in *auter droit*, that is, in the right of  
another, meaning his Testator. Second-  
ly, that Executors are but the Ministers  
and Dispensers, or Distributers, of their  
Testators Goods.

Co. lib. 6.88.  
b.  
See this also  
Plow. Com.  
5. 29. a.

*alteration of Property in the Executor's  
hands, so as some Goods become his own,  
which he had as Executor.*

TO this Head or Chapter, treating of  
the difference between the Interest in  
Goods as Executor, and others had merely  
in one's own right and to his own use,  
is not impertinent to consider how that  
which one hath at the first as Executor  
may be changed in Property, and become  
the Executor's own to his own use, as over  
his Goods which he had not as Exe-  
cutor. Here let us first consider of ready  
money left by the Testator : for since  
pieces of money, viz. shillings, groats,  
pieces and half pieces of Gold, cannot  
be known one from the other, it must  
needs follow, that these coming to an  
Executor from the Testator, must in some-  
sort

sor be altered in Property, so as thc<sup>t</sup> the Executor shall be said to have much in money or value, yet can it be discerned which money in his hands was his Testator's, and which his creditor's? Consequently the Sheriff upon the *F*  
*racias* for a Creditor, who hath record against the Executor a Debt owing from the Testator, cannot take away money in Execution as the Testator's, in my opinion. *Quære*, if thereupon a *Devastavit* shall be returned, or what shall be done.

But what if the Testator were indebted to the Executor, or if the Executor having ready money of the Testator's or otherwise, shall pay a Debt of the Testator's with his own money, what shall we say of the Conversion or Alteration of some of the goods from being his as Executor, to be his merely in his own right? Hereof I have shewed elsewhere in conceiving, which is briefly thus; That except either he have in his hands more of the Testator's, (for of that it is easy to make a proportionable change) unless the summe to him owing from the Testator, or by him paid for his Testator, amount to the full value of all the Testator's Goods in his hands, or dox

2 El. Dy. 185.  
This divers  
Books af-  
firm,  
20 H.7. 4.  
C<sup>t</sup> Kel. Rep.  
59. & 2, 3  
El. Dy. 117.  
6 H.8. Dyer  
fol. 2. a.

eed the same, no Alteration can be, untill  
ome Election or Declaration by the Exe-  
utor made which of the goods, not ex-  
ceeding the Debt unto him, he will have  
be his own : For where the Testator's  
ods exceed this Debt to him, the Pro-  
erty of all cannot be changed ; and of  
hat part shall the Law adjudge the  
ange, till choice by the Executor ? It

*Plom. 554. so  
of a Legacy  
in money  
given to the  
Executor.*

good therefore for him to doe as the  
other-Guardian in Socage , who is  
endow her self, calling her Neighbours,  
and expressing to them which part of the  
and she will have for her Dower. So  
t the Executor doe. But let him take  
ed that his Election or Declaration ex-  
ed not his Debt, lest it be void. And  
at such particular Election is to be *See 2, 3 Eliz.  
Dyer 1876*  
ade, seems to me proved by the Case of  
*I E. 4. fol. 21.* where the payment of  
oney, and detaining or taking of a Horse  
the Testator's, is mentioned. But *Choke*  
ere says, this cannot be done without the  
ordinarie's Assent. And the Reporter  
inks, though the Ordinary do assent, yet  
e Property shall not be turned into the  
xecutor as his own.

Another Alteration is of the profits  
Lease come to the Executor from  
Testator : For since no more thereof  
shall stand in the Executor as *Assets* than  
so much onely as exceeds the yearly value  
according to the resolution in *Hargrave's*  
Case, it must needs follow that the re-  
due of the profits must be the Executor's  
he paying the Rent out of his own pur-  
  
*C. & I. f. 31. b.* as that Case resolves in consequence, that  
that he shall be sued for it in the *Detinet*  
and in the *Detinet* onely as for the Rent  
due before the death of the Testator.  
Thus though he have the Lease as Exe-  
cutor, yet part of the profits are merely  
his own, not as Executor.

And looking back upon this Case, one  
may discern a necessity sometimes of the  
Executor's paying with his own money  
for his Testator's Debt : as where the Tes-  
tator being to pay a Rent at *Michaelmas*,  
or our *Lady-day*, he dies a day or two  
before, or, to put it more clearly,  
a day or two after the Feast, not leaving  
any goods to pay the Rent, other than  
the future profits of the Lease. He  
unless that the Executor will forgo  
the Lease, he must lay out of his own  
money.

Now if in this and other like Cases he could not doe this untill he had under Seal, or by act in the Court Spiritual, an Assent of the Ordinary, it would be an extraordinary trouble to Executors.

I finde also *tempore Hen. 7.* another <sup>20 H. 7. s. 4.</sup> mean of altering Property, to wit, where a *Fieri facias* comes to the Sheriff to sell or levy a Debt of the Testator's goods; now, saith the Book, may the Executor buy these goods of the Sheriff as well as another; and if he do, the Property which he had as Executor shall be turned into a Property *in jure proprio.*

If an Executor amongst his Testator's goods find and take some not his, and after, these being claimed by the Owner, who left them in the custody of the Testator, the Executor not crediting the claim, still keeps them, and the Owner hereupon recovers damages in an Action of Trespass, or of Trover and Conversion; now (and so in all other like Cases) are these goods become the Trespassor's in <sup>20 H. 7.</sup> <sub>Kelw. C. a. 58,</sub> property, because he hath paid for them: therefore it is not strange, if in like manner an Executor, paying out of his own purse for or in lieu of the Testator's

goods, have so much of them (where no certainty) changed in property, all become his own. This is but put as an instance understood with the exception and cautions precedent.

---

## CHAP. VIII.

*Of some cases and questions between the Executor and the Heir.*

<sup>21 H.6.30.</sup>  
If other  
goods taken  
among  
them, he is  
excused.  
  
<sup>21 H.7.25.</sup>  
*Vid. Lib.*  
<sup>Intr.640.</sup> It  
is so plead-  
ed.

THE Executor may in convenient time after the Testator's death enter into the House descended to the Heir, for the removing and taking away of the Goods, so as the door be open, or at least the key be in the door of each Room. For although the door entrance into Hall and Parlour be open, the Executor cannot by that justify the breaking open of the door of any Chamber to take goods there, but only may take those in the Rooms which be open. And this is proved, as to me it seems by the Case of the Chest with Evidence which, saith the Book, the Executo

ma

lay take and put out the Deeds, delivering them to the Heir, viz. the Chest being unlocked, as I understand it. Now Chamber or other Room within a house locked is an inclosure of better respect than a Chest. But if the goods be not removed within convenient time, the Heir may distrain them as *damage feasant*.

43 E.3.24.  
Bro. 145.  
makes a  
*Quæ.* if it  
be locked.

Plow. Com.  
280.

Where the Testator recovers Land and damages, or a Deed and damages, dying before Execution, the Heir shall have execution for the Land or Deed, and the Executor for the damages : but *mp. Edward.* 4. it is said, that untill the Heir sue a *Scire facias*, the Executor cannot sue Execution for the damages.

43 Ed. 3.2.  
10 Ed. 4.5,6.  
Of the Deed  
Execution  
first.

If a Creditor be made Executor by his Debtor, and pay himself part out of the goods ; he cannot sue the Heir for the rest, because the Debt cannot be apportioned ; but otherwise he may, saith *e Book* : yet *Quare*, if he do take upon him the Executorship, and have goods sufficient to pay all.

12 H. 4.

If a Debt be recovered against one who eth before Execution sued, leaving goods sufficient to satisfie ; now shall not the and descended to the Heir be char-

7 H.4,f.31.  
See Bro. Sc.  
124.

ged therewith, nor by like reason as  
Land conveyed after Judgment.

Co. l. 3. f. 90,  
91. To like  
purpose see  
more, *Littl.*  
f. 77. b. 2 *El.*  
*Dyer* 281.  
*Plow. Com.*  
291.  
21 *H.* 7. 4.

See a good difference, where Land is  
conveyed upon condition of payment  
the Vendor, his Heirs or Assigns, and he  
dieth before the time, and where it is to be  
paid to the Vendee, his Heirs or Assigns,  
and he dieth : in the first Case payment  
shall be to the Executors, but not in the  
other.

What things pertain to the Heir, and  
what to the Executor, is before shewed.  
As for *Frowick's* opinion, that where goods  
be mortgaged upon condition, that if the  
Heir or Executor pay, &c. here if the  
Heir make payment, he should have the  
Goods, I see not, for my part, how that  
can be.

### A Directory for the following Chapter

- A. All (as but one) represent the Testator's person, and must joyn and be joyned in Suit; & è contrá.
- B. Where one alone must answer Suit, albow.
- C. When they differ in Plea, the last shall

be taken, but one may confess alone.

- . One, as well as all, may give Assent, or release the whole.
- . One cannot give, nor release to another, nor divide.
- . The possession of one is the possession of all, to what purpose.
- . If the Survivor die Intestate, the Testator is Intestate, though the other Executor left an Executor.
- . Executor included in the person of the Testator, and represents it, is his Assinee; all one: & è contrá.
- . What change by death of the Testator, touching proceeding in Suit.
- . Proceed to or in Execution; where without Scire facias.
- . Whether the Executor stand in his own quality, or his Testator's.
- . Where one alone may sue.
- . In Suit for them, such as will not joyn shall be severed, and the other may sue and prosecute alone: Consequents indé.
- . Death of one Executor, Plaintiff or Defendant, where abates Writ.

## CHAP. IX.

*How Executors stand between themselves, and in representation of or relation to the Testator, as his Assignee or Deputy, or as the same person with him; and where, and to what purpose, as other persons.*

Are as one person; therefore cannot

plead several Pleas in Abatement.

37 H.6.17.

39 H.6.44.

38 E. 3. 9.

Bro. Ex. 13.

Bro. Ex. 20,

21.

Therif re  
one Executor  
sued, if he  
pleads that  
there is a  
nother Exe-  
cutor not  
sued, must  
plead that  
he did Ad-  
minister.

9 H.6.44.

Bro. 1. 33

H.6.38.

Bro. 20.

33 E. 3.

*Quid juris  
clamat s.*

**F**irst, all of them do represent the person of the Testator, and therefore must they all joyn in Suit against others, and in Suit by others they must be all made Defendants, or at least so many of them as do Administer: though the Executors themselves might take notice by the Will how many Executors there be, and must frame their Suit accordingly; Creditors and Strangers need not take notice of any more than do Administer, and execute the office of Executors. For this reason, as I take it, in the time of King Edward the third, where two Executors were of a Term, and the Reversion was granted by Fine, mentioning but one Termer, and thereupon a *Quid juris clam*

lamat accordingly brought against that one Executor; this was held good enough, hough the other Executor was not named in the Suit: belike, because that one (who indeed was the Testator's Wife) did only occupy the Land, and take the profits hereof; for else, since all the Executors do represent the Testator's person, all must have been named. Therefore did the Judges resolve in the time of *Hen. 4.* that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor; that Executor should have Aid of his fellow-Executor, to the end that both might have Aid of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator as one person, (for so speaks the Parliament) it was enacted in the time of *Edward the third,* 9 Ed. 3. c. 3. that the Executors, though never so many, shall have but one Essoyn, either before appearance or after; because their Testator, whose person they represent, could have had no more.

It is farther also enacted by the said Statute, that where two or three Executors or more be, they being sued in an

Action

13 H. 4.  
Aid 186.

A.

A.

B.  
But not, if  
he appear at  
the sum-  
mons, 1 E.4.  
1. 14 H.4. f.  
II. But the  
Plaintiff  
must declare  
against all.  
He need not,  
but he may  
admit ano-  
ther to ap-  
pear and  
plead after.  
7 H.4. 12.

But Process  
must be con-  
tinued a-  
gainst all.  
7 H.6. 35.

Executors  
of Executors  
by Equity.  
30 H.6.45.

Bro. Exec.  
99. 28 H. 6.  
f.4. 14 H. 4.

23,24. So  
negatively.  
22 H.6.f.1.

28 H.6.f.4.  
3 H.6.35. a.  
39 E. 3. 5.

There it is  
not merely  
as Execu-  
tors; it is out  
of the Stat.

11 H.4.63.  
as if in Deb.  
& det.

Action of Debt, though all do not appear, yet such one of them or more as doth do appear at the Grand Distress, shall answer alone without his or their Compan ons. And this Statute hath been taken t Equity in three respects.

First, touching the Persons; that it sha extend not to Executors onely, but also Executors of Executors, yea to Admin strators also; though the Stat. speak onel of Executors.

Secondly, touching the Action; where as the Stat. speaks onely of the Action of Debt, it is taken by Equity to extend t other Actions, as the Writ *De rationabi parte bonorum*, and *Detinue*: yet per haps this latter Action will be said not to be maintainable against Executors for their Testator's act, but for their own onely. But we are not yet come so fa as to determine what is maintainable but whether, before all the Executors do appear, he or they which have appeared shall be put to answer; and so to bring it to Decision, whether the Action be maintainable or not. I think also that in the Action of Covenant, and all other Actions against Execu tors as Executors, he which appeareth must

it answer without his Companions ;  
ough the greater opinion in the *Qua-*  
*gesimes* were contrary touching the  
ction of Covenant. But as for the *Sub-*  
*na* against the Executors , which is to  
ake them to answer to a Suit in Equity,  
it hath been *temp. E. 4.* taken to be out  
the reach and intent of the Statute. So  
o of the *Latitat* in the *King's Bench*, as  
is held in the same King's time ; ex-  
pt all the Executors , making up the  
hole representative Body of the Testa-  
r, be in the custody of the Marshall, one  
more of them who are there shall not  
be inforced to answer : and so was it also  
tely held in the *King's Bench* , where  
laster Justice *Houghton* gave an excel-  
ent reason that this Case is out of the  
id Statute, *viz.* for that this Writ doth  
ot mention any Debt, or name the De-  
endant's Executors .

Thirdly and lastly , that Statute is ex-  
ended by Equity to other Writs or Pro-  
cess : for where the Statute speaks onely  
f the grand Distresse , and the Execu-  
tors appearing thereupon ; it hath been  
many times ruled, that when he or they  
pear upon the Attachment , *Capias*  
*x Exigent* , answer must be , though  
the

B.  
Cont. 47 E.  
3. 22. So  
7 E. 4. 20.  
21. 3 H. 4.  
20. In *Sci.*  
fac. upon a  
Pardon by a  
Defendant  
outlawed at  
their Suit.  
47 E. 3. 22.  
Onely *Fenold*  
in the affir-  
mative.  
8 E. 4. 5.  
9 E. 4. 12.  
13.  
B.  
20 vel 21  
*Jac. Regis.*

E. 4. 1.  
40 E. 3. 1.

B.

11 H.4.63.

C.

Or if but  
one appear,  
28 H.6.f.364Judgment  
against all.

See 9 E. 4.

12, 13, 14.  
Where B,  
who is not  
Executor, is  
jointly sued  
with A, and  
B confesseth.

21 H.7. 25.

Yet 7 E.4.7.  
they may fe-  
ver in Pleas  
not dilato-  
ry.

C.

7 H.6. f. 6.

per Cottel-  
more. Ifthey recov-  
er, and one  
of them

prays a Cap.

ad sat. and

the other a

Fieri fac.

the first, as

best, shall be

granted,

3 H.4.10.

Bro. 44.

So where

the Defen-

dant Out-

lawed at the Suit of two Executors, and upon the *Scire facias* after his

Pardon but one appears, 21 H.7.25. 9 E.4.12, 14.

the rest appear not; for so the word *Dominicis* is taken for all compulsory mean, or enforcement of Appearance. B: where the Statute reacheth not, *vi* when the Process is determined again one or more as by Outlawry, &c. the the rest must answer by the rules of the Common Law; except it be in the case of Husband and Wife Executors, so there the Wife cannot answer without her Husband, nor doubtless can he without her, where she and not he is Executor; but where both be Executors there he may answer without her, but not she without him. When Executor as Defendants have appeared, if any one of them will confess the Action, this binds and concludes the rest; but if one will plead one Plea, and the other another, that (say some) shall be received which is best for the Testator's state: so where they sue, such as will not prosecute shall be severed, and the rest without them may proceed; and in like manner where they pray to be received to defend their Term, and one of them after makes

Default,

efault, it shall not be the Default of all, at the rest; or he, if it be but one who appears, shall be received to uphold the fence of the Term.

Thirdly, so where they plead a Release to the Testator or themselves, one after making Default; this shall not be nor make a total Default in the Executors, to produce a Judgment or Condemnation against them. Yet in truth, each Executor hath the whole of the Testator's Goods and Chattels, be they real or personal, and each may sell or give the whole. One of them cannot give nor release to the other his Interest; and if he do, it is void, and he who releaseth shall still have as much Interest as he to whom he released, because each had the whole before. Upon this reason long since, where one of the two Executors released but his part of a Debt, it was held that the whole was discharged. And so, if one Executor retain his part of the Testator's goods, all asseth, and nothing is left to the other; for that each hath the whole, and there be no parts or moyeties between Executors. Therefore also, though

Lease for a thousand years of a thousand Acres of Land come to two Exe-

21 E.3.13.

27 H.S.21,

22.

D. E.

C.

If an Horse come to four Executors, each hath an Horse, and yet all four have but one.

E. Executors or more, no Partition or Division can be made between them, because it is not between them as between joyn't Lessees of Land, where each hath but a moyety in Interest, though Possession of or through the whole. Amidst Executors each hath the whole, and therefore if he grant his part, he grants the whole. But one Executor may demise grant the moyety of the Land for the whole term, and so may the other do, and this way they may settle in Friends others trusted for them, a moyety for each, either in several or undivided but one of them cannot make a Lease the other of any part, for he had the whole, nor can one sue the other as Executor. Yet if the Testator devise to one his Executors all his Goods, after such Debts and Legacies satisfied, there, after those satisfied, the Executor may take the Goods, and maintain an Action of Trespass against the other Executor if he take them from him, and consequently an Action of *Detinere*, for keeping or detaining them: but this as Legatee, his own assent perfecting the Legacy.

The possession of one Executor is the pos-

possession of all the rest : so as if one appearing to a Suit, and the other making default in whose hands all the goods which are not administered, if, I say , here he that appears pleads that he hath nothing in his hands , this shall be found against him ; for whatsoever any of the co-executors hath he also hath , and is in his possession ; and so shall the Creditor recover, and have Judgment to be satisfied out of the Testator's goods, as in his hands. And therefore if goods be taken from one , all may maintain an action of Trespass thereupon ; for the possession of one is the possession of all. But the possession of one shall not be so ie possession of all, as to charge the other's own goods, whereof more elsewhere.

14 H.4.12.

Bro. 12.

F.

All must sue. 19 H.6.

65. Cont. 24

E.3.40. &amp;

42 E.3.26.

It may be in his name only from whom taken, nor need he be named Executor. Bro. Exec. 31.

39 H.6.45.

F.

G.

32 H.8. Bro.

Exec. 149.

39 H.6.45.

Where two Executors be made, the one taking a Will and Executors, and dying, the other die after Intestate ; now shall not the Executor of him who first died be Executor to the first Testator, but he is dead intestate, because the surviving Executor is dead, and in him the Executorship was wholly and solely settled by the death of his fellow before him. So Administration *de cenis non admin.* shall be committed.

The

Co.9.lib.5.f.

97.

H.

Chapman &  
Dalton's  
Case. Plow.Sir Edward  
Phitton's  
Case, Co.lib.

2.f. 80.

A.  
So where  
the Stat. of  
*W. I.* gives  
time for  
proof to  
him whose  
goods were  
wrested, his  
Executors  
may doe it,  
if he die be-  
fore the  
time.

Co.1.S.197.  
b. Co. lib.6.  
f. 80.

The Executors, or Executor, if but one, so represents the person of his Testator, that he is in Law his Assignee by the very making of him Executor : so as if he made a Covenant to make a Lease to *F S* at his Assigns by such a time, and *F S* dieth before that time, and before the Lease is made ; now must the Lease be made to his Executors as his Assignees, representing his person : so also in a condition to pay the Feoffor or his Assignee : yet if a Lease to *A* and his Assigns during the life of *B* shall not go to the Executors of *A*. So where in a general Pardon by Parliament there is an exception of persons Outlawed after Judgment, the person so outlawed shall satisfie the Creditor who hath outlawed him. If the Outlaw die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the Pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied when he left the World & diem obiit extreum. Yet where he sold Land to *B* upon Proviso, that if he payed to *B*, his Heirs or Assigns, &c. died, *A* payed at the day to his Executor

or, and it was doubted that it was not good ; for the word Assignee could not reach to him , being no Assignee of the and. And where the Executor brought Action of Account upon a Receipt by the hands of the Testator , the Defendant could not be admitted to wage his law ; for that this was held a Receipt *per litter mains* : yet it is clear, that if one Bond or Covenant tie himself to pay such a sum at such a day , not mentioning his Executor at all ; yet is the Executor bound , as included in the name person of the Testator. And where the Statute 23 of Hen. 8. gives the Writ

Attaint ( in the course there mentioned ) against the party that had Judgment , it lieth against his Executors , if he be dead ; but thereof another reason is given. Where a man was bound that he should not sue upon such a Bond , and he died , and his Executor sued ; this was held to be no Forfeiture of the Bond. So here one was bound to pay ten pound within a moneth after request made to him , and he died before request ; it sufficed not to make it to the Executor , as Lanwood said. It was likewise held , that the Warrant of Attorney put in for the

Also Executors may have restitution for stolen goods ; and a Writ of Error ; yet the Statute speaks but of the party.

A.

2 Eliz. Dy. 180. Cont. where to A the Feoffor, his Heir or Assign. Co. lib. 5. f. 97. 2 Eliz. Dy. 183. 3 Eliz. Dy. 201.

H.  
es H.8.16.

M.15 & 16  
Eliz.

L

Plain-

L.  
34 Eliz. vel  
circiter, Ti-  
therly &  
Lexor.  
Waln. in  
ban. Reg.

I.  
26 H. 8.  
Bro. Stat.  
Merchant

43.

K.

2 R. 2. 8.

H. I.

15 H. 7. 14.

P.

15 E. 3. Re-  
spond. i. con.  
upon a Stat.  
Merchant.

K.

Cont. Nat.  
br. 267. up-  
on a Recog.

I.

H.  
30 El. rot.  
31. in ba.  
Reg.

Plaintiff in Debt, it sufficeth not for his Executor to bring a *Scire facias* upon the Judgment. And if Executors sue Execution upon a Statute in the name of a Conusee, as if he were alive, this is void, and they may sue out new Extent; and this they may do without any *Scire facias*, as well as the Conusee might if he had been alive. But by *Hussey*, Justice, If the Conusor in a Statute-staple be turned dead by the Sheriff upon the Extent, a *Scire facias* must be sued out before Extent proceed; and upon a Judgment had, if the Recoverer die before Execution, his Executor cannot, as himself might, sue out Execution without *Scire facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any Action of false Imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth.* it was resolved upon the motion of *Anderson*, but withall it was held, that relief might be by *Andita Querela*.

Like Resolution was in the King's Bench, after some doubt by *Wray* and the other Judges, where the Defendant died after

fter a *Fieri facias* awarded, and before it was executed; that the Sheriff might proceed upon the Goods in the hands of the Executors.

But if the Defendant in an Action of Debt upon a Bond plead a Tender at the time and place of payment, and tenders the money in Court, where it rests, and then he dies; now shall not the Plaintiff have this money, because the property thereof is changed, and become the Executor's, as was held in the *Common Leas*; but he is put to a new Suit against the Executor.

Yet where Judgment is once given in Writ of Partition for a Terrier, or in a Writ of Account; if the Plaintiff die before the second Judgment needfull in both cases, the Executor is not put to a new suit, but may proceed by *Scire facias* upon the former Judgment: as the L. *Anderon* held, upon the motion of *Fenner*, Serjeant. Though before we found the Executor not in points penal all one with the Testator; yet in point beneficial the Testator includes him in some Cases: as where an Abbot granted to his Lessee to take Estovers in another's ground, it was held that his Executor, though

32 El. 4<sup>d</sup>  
circiter.  
I.  
Pascb. 28.  
R.

not named, should enjoy this during the term, as well as himself should have done. And whereas the Statute 23. Henry the 8. gives Costs to a Defendant against a Plaintiff suing for a wrong, breach of promise, or the like, done to the Plaintiff, against whom it passeth the Verdict or Non-suit; it hath been resolved, that an Executor suing upon such wrong, or breach of Contract to his Testator made, should not pay Costs, because he is another person then the Testator and so is it usual in experience. But if in Suit the Attorney of the Executor misbehave himself towards him and for this the Executor sueth him here, if it pass against him in manner as aforesaid, he shall pay Costs, because this was a Suit for a wrong done to himself.

If *A* recover a Debt as Executor of *S*, and makes *B* his Executor, and dies before Execution sued; *B* is not plaintiff to new Suit, but may have Execution up on that Judgment. But if *A* or *B* die Intestate, now could none as Administrator to either of them, nor as Administrator of *S*, have Execution of the Judgment; for the former hath no interest.

*Trin. 36 Eliz.  
in ba. Reg.  
H. M.*

*Pa. 41 Eliz.  
in com. ba.*

*H.  
28 H. 8.*

n any thing pertaining to *F S*, and the latter cometh to Title above the Judgment, *viz.* as immediate Administrator to *F S*, who is now dead Intestate, and derives no Title from the Executor who recovered.

If a Conusee have a Certificate into the Chancery upon a Statute, and then lies before Extent taken out; his Executor is put to a new Certificate, and for obtaining of it must make *Affidavit* that no Extent hath yet been taken out.

<sup>2 E. 4.</sup>  
180. I.

If an Alien joyn with his Wife who is Executor in a Suit for Debt, and it cometh to Issue, he shall not have Trial *er medietatem alienig. or Linguae*, as should be if he otherwise were party to a trial; as was held in the Case of Doctor *Julio*. Yet if a Nobleman sue as Executor to another not noble, he shall for his Non-suit be amerced five pound, as he sued in his own right; as was conceived 21 E. 4. 77. By the same rule and reason, doubtless, a Nobleman sued as Executor shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any Trial shall be for any Issue, there shall be two Knights

M.

of the Jury, as in other Cases where Peer is party. Likewise where the Will is to have her convenient Apparel, where of the Executor must not bereave her; she be a Noble-woman, it shall be answerable to her degree.

If one Executor onely sell Goods the Testator, he alone may maintain an Action of Debt for the money. So Goods be taken out of the possession of one Executor, he alone may maintain an Action, and that without naming himself Executor.

Some touch hath been before of Summons and Severance, whereabout it this added: If one Executor will not or cannot conjoyn in Suit with the other so as he is summoned and severed; notwithstanding his death after the Suit is not abated *16 Ed. 2. Fitz. 111.* Yet if he live till Judgment, he may sue Execution, say other Books, *13 Ed. 3. Fitz. Exec. 9. 1 R. 2. Privilege 2.* Yet *Quer.* of that, for he cannot acknowledge satisfaction, which hath been since resolved. *Mich. 14 & 1 Eliz. Dy. 319.* And the reason there being, because he is no party to the Judgment; by the same reason can he not sue Execution upon it; for how can he

A.

38 E.3. fo. 9.

N.

P.

O.

3 H. 7.

I.

&amp; 5 E. 2.

Fitz. pro

802. Cont.

38 E.3. 13.

&amp; 20 E. 3.

111. Account

78.

have Execution, for whom there is no Judgment given ? now the Recovery is solely in the name of the other Executor. Yea, by the said last Book it seems that after Judgment had he cannot release the Debt, because it is now altered in nature, and turned *in rem judicatum*; though at any time before Judgment he might have released it, as both that Book saith, and the two precedent, *np. Ed. 3. Rich. 2.* Yea, in an Action Account, after Judgment had that the defendant shall account, the Release of him severed is a good Discharge to the defendant; as was resolved *48 Ed. 3. 14*, . But this is not a plenary Judgment, for nothing is recovered thereby; but another Judgment is to be had after the account, which may be against the Plaintiff, so as this Release came before any Debt or Duty adjudged. What if the defendant be had in Execution at the suit of the Executor, who prosecutes and escapeth ? whether may the severed Executor discharge the Sheriff Gaoler by a Release ? I think he may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

2 H.4. s. 14.

Writ is abated ; onely where he so dyin  
 was before feyered, Opinions have bee  
 different, as above appears. So also  
 it if one of the Defendants Executo  
 die. Yea, if the Plaintiff Creditor su  
*A, B, and C*, as Executors, where onel  
*A* and *B* are Executors, there by th  
 death of *C* the Writ abates, or falls t  
 the ground : yet *A* and *B* (as I think  
 might have pleaded in Abatement, th  
 they onely were Executors ; trayersin  
 that *C* was not Executor : but the Boo  
 doth not so resolve. See 46 Eliz. 3. fo  
 9, 10.

*A.*

As *A* and *B* above might admit tha  
 Writ against them and *C* ; so if the Wr  
 or Suit had been against *A* onely, and h  
 so admit it, not pleading in Abatement  
 the Recovery against him alone is good

9 E. 4. 12.

21 H.6.30.

*M.*

21 E.4.49.

69. 42 E. 4.

13. 14 H. 6.

14,15.

One that is Out-lawed, or Attainted i  
 his own person, may yet sue as Executo  
 because this Suit is in another's right, *viz*  
 the Testator's : But he that is Excommu  
 nicate cannot proceed in Suit as Execu  
 tor, because none can converse with him  
 without being excommunicate, as a Boo  
 says. Yet doth not this Excommuni  
 cation pleaded abate or overthrow the

Suit.

it, but make that the Defendant may <sup>3 H.6.40.</sup>  
be absolved from answering his Suit untill <sup>Littl. 44.</sup>  
the Plaintiff be absolved and discharged from <sup>Co. L. 81.69.</sup>  
Excommunication. <sup>11 R. 2.</sup>  
<sup>Excom. 25.</sup>

---

## CHAP. X.

of the Possession of Executors, or their  
actual Having.

*What shall be said so to come to their  
hands as to charge them.*

*What shall be such a getting or going  
from them as to excuse them.*

WE have before considered what things shall come to Executors, and, being come, shall be *Assets* in their hands. Now, for that it is said in *Reede's Case*, that an Executor shall not be charged with or in respect of any other goods than those which come to his hands after his taking upon him the charge of the Executorship; let us now examine what shall be said and accounted such a full and compleat coming to the hands of Executors, as shall make them within the reach Co. lib. 5.

reach and charge of Creditors and Legatees, *viz.* for the payment of Debts and Legacies. As touching Debts due to the Testator, it hath before been shewed, that untill Judgment and Execution had the be not *Assets* in the Executor's hand. Now then as touching other Goods or Chattels possessory, which are of two kinds, *viz.* real and personal, let us put the case thus.

The Testator at the time of his death hath a flock of Sheep in Cumberland, Corn in the Barn in Cornwall, Bullock in Wales, fat Oxen in Buck. shire, Money Household-stuff and Plate in London, Lease for years in Norfolk, and his Executor dwells at Coventry, *viz.* far from all these places; what kind of Possession shall the Law judge this Executor to have in every of these instantly upon the Testator's death, and before he come where any of the things be, either to see or seise upon them? In all the particulars above mentioned the Law is all one, except the Case of the Lease for years; which if it be of Land, (as is most usual) then, because it is a settled and immoveable thing, the Law doth not reach to it the foot of the Executor, to put

: him in actual possession, (for *Possessio quasi pedis positio*) untill himself or  
ne for him do actually enter there-  
on. Nor indeed need the Law help  
supply the want of actual possession in  
s Case, as in the case of Moveables;  
ce Land cannot be carried away as  
oods may, and therefore is not subject  
purloyning or imbesilment as Move-  
les are. But if the Lease for years  
re of Tithes, the Executor, though  
never so remote a place from them,  
ll be instantly upon the setting out  
ereof in actual possession of them, so  
he may maintain an Action of Tres-  
ss against any Stranger which shall take  
e Tithes set out, though he nor any for  
m did ever before possess any of the  
id Tithes, or came near unto them. But  
the Case were of a Lease for years of a  
ecoty, consisting not onely of Tithes,  
t also of Glebe-lands, into which En-  
y may be made, as also Livery of seisin  
it; then it may perhaps be some questi-  
, whether such an actual possession in  
ithes shall be given by the Law to an  
xecutor neglecting to enter, or not en-  
ing into the Glebe-land. And so I leave  
e consideration of Chattels real.

45 E.3.17.  
28 H.6.43.

Touch-

9 E. 4. 50.  
Plow. Com.  
281.  
32 H. 6. 13.  
24 H. 8. 22.

Touching things Personal, in which the Executor hath such an actual possession presently upon the Testator's death, that he may maintain an Action of Trespass against any Stranger taking them away, or spoiling them, though neither any for him ever came near them whether yet this shall be such a possession in the Executors, and such a coming of these Goods to their hands, as to charge them with payment of Debts and Legacies, yea to make their own Goods liable instead of these, is a Point worthy of consideration.

And, doubtless, this throughly sifte will prove a Case mischievous, whither way soever the Law be taken. For first it must be admitted, that without the Executor's laying his hands actually and particularly upon the Goods in the House or Fields of the Testator, whether the Executor hath resorteth, he shall be said so in possession as to stand liable unto the Creditors, so far as they extend in value, though after others purloyn or imbesil them. Now then, if distance of place shall make difference, where shall be the bound and limit of that distance? and if the Executor may come after

er a Stranger's taking or possessing of the  
oods, it is mischievous to Creditors.

On the other side, if it shall be laid  
on the Executors to answer for all the  
oods whereof the Testator died pos-  
sed, it will be mischievous for them,  
to deterr them from taking Executor-  
p upon them; since much purloyning  
y be even of Money, Jewels and  
oods, by Servants and others about  
the Testator, or where these things  
are. I think therefore, that if with-  
out any fraud, collusion, or voluntary  
conniving on the part of the Executors,  
they be prevented by others of laying  
Hold on the Testator's Goods, so as  
it they may dispose of them, espe-  
cially if it cannot be knoyn by whom  
they are so purloyned and imbesilled,  
if they be persons fled or insolvent;  
it then they shall not stand upon their  
ore, as Goods come to their hands,  
respect whereof Creditors or Le-  
ttees shall draw so much from them  
en out of their own Goods, as in o-  
ther Cases where they have no such ex-  
euse.

And of this mind I the rather am, be-  
cause I finde the whole Realm in Par-  
liament

13 H.6. c.1. liament taking notice of such prevention of Executors coming to the Goods of their Testator, by the wrongfull and imbesilment of others, without a default in themselves. And in this C<sup>t</sup> the Parliament hath given special remedy, viz. that Writs shall be directed Sheriffs, to make open Proclamati for the appearance of the parties deli quent in the *King's Bench* at the day mited; and in default thereof they sh be attainted there of Felony, the Writ b ing returned executed, viz. Proclamati made. But note, that this Proclamation to be made two Market-days, with twelve days next after the delivery of t Writ, and the last Proclamation must fifteen days before the day of Appearance. And these Proclamations must be made such Cities, Boroughs, or Places, (as the Statute) not expressing what is mea by the word *such*, and therefore mea ing doubtless those in which the act offence is committed. So that if the fact be not committed within the limi of some City, Borough, or Market-Town no remedy is to be had by the Statute for that the Proclamation is to be mad upon Market-days in the place where

Now besides other Places, even  
the Boroughs, viz. Towns sending  
burghesses to the Parliament, have no  
markets, and so are no places within  
Act. Also two Executors must re-  
uire this Writ; therefore where there is  
but one Executor, no relief is given by  
Law, for it is penal, making Felony,  
and therefore shall not be extended by e-  
ity beyond the words. Lastly, it ex-  
tends but to the Executors of Lords and  
persons of good Degree, and onely to the  
espassing Servants of such persons, not  
other Strangers, purloyning the goods.  
It now who shall be said to be persons  
good Degree, not being Lords, I will  
it much labour to decide; the rather,  
cause I have not heard nor read, to my  
remembrance, of any Action brought up-  
this Statute: but I think that good  
degree must stay either at a Knight, be-  
ing the lowest Dignity, or at a Gentle-  
man, being a degree of Worship, as  
where is shewed, and not stop any  
ever.

And the said Statute seems in some  
it to imply an opinion this way which  
Incline to, in that it expresseth this pur-  
loyning to be an impediment of the Exe-  
cution

cution of the Will , whereas if the Executors shall answer and make good Creditors and Legatees out of their own state and goods, for these imbesill, the Execution of the Will is not hindered ; but the Executors are damnified by their own private value. Yet it may be said, on the other side , that some things given *in specie* by the Will, such a piece of Plate , such a furniture of a Bed Chamber, such a Jewel, may be purloyned so that the Legatees can never have them, and consequently , the Execution of the Will be hindered , though some recompence be made by the Executors : but how these Legatees shall recover recompence in such Cases, for that Legacies are not to be recovered by Suit at the Common Law , I must leave to the Professors of the Common or Civil Law to inform. But if the Executor be of secret assent to this imbesilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in damage if known where they or the imbesille be, is a shrewd evidence, or proof; then shall the Executor be adjudged an haver of them, and so stand charged as having them : for *Pro possessore habetur quod*

*olo deficit possidere.* And if in any Case the maker by prevention from the Executor, before his knowledge ( perhaps ) of the Testator's death , or, at least, before his possibility of repair to the place where the goods were, to put them in sure custody, if, I say, such Actor keep these goods from falling upon the shoulders of the Executor , they shall surely fall upon himself, and make him chargeable at the Creator's Suit , as an Executor of his own wrong.

*If Goods lost by or gotten from Executors.*

But put we the case (for thereunto shall be our next step) that Goods come fully into Executors possession and ends, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own Estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our learning touching Escapes of persons taken in Execution and imprisoned, if such be rescued by Alien enemies , the Sheriff or Gaoler shall not answer out of his own goods for this Debt ; otherwise,

33 H.6.1.

10 E. 4.2,3.  
7 Eliz. Dyer  
241.

if it be done by Subjects, against whom remedy is to be had by the course of Justice : and so should I think it to touching Executors, *viz.* That if enemies landing (as near the Sea-coast may easily and often happen) shall take away Cattel or Goods from an Executor, hereby he shall be excused; contrariwise ordinarily, if the erection or demolition be by Subjects known, and thereby actionable. Another difference shall think may probably be taken from the rules of our Learning touching Bailment. If *A* deliver Goods to *B* to keep

*Vide 29 Ass.* as his own, or generally, *viz.* without  
*p. 28. 8 E. 2.* any special undertaking by *B*, to keep  
*Fitz. Detin.* them safely, and without any money or  
*59. 9 E. 4.* other valuable consideration given for the  
*90. 13 H. 7.* safe custody: here, if *B* be robbed of  
*4. Co. lib. 4.* them, he shall not make satisfaction to  
*fol. 83, 84.* *A* for them: and so if they be stolen  
 from a Servant or Factor. But if they be taken away by a known Trespasser not feloniously, some opinion hath been that the Keeper shall make recompence because he hath remedy for recompence or satisfaction from the Trespasser. Yet of this latter I should doubt, because *A* himself as well as *B* may have this Action

for damages against the Trespasser.  
Now an Executor is of the nature of such  
one, having the custody of another  
man's goods; and I have seen in a Manu-  
script entire, the Writ of Trespass by the *In custodia  
sua existit*  
Executor, expressing goods of the Testa-  
tor in the custody of the Executor to be  
taken from him: therefore methinks he  
ould no otherwise be charged then *B*,  
whom goods were, as above is said, de-  
ivered to be kept. For the Executor  
only shall have no benefit nor advan-  
tage by the Executorship: all the Goods  
not sufficing, perhaps, to pay Debts  
and Legacies, which is the state we  
ost think of, *viz.* where goods want  
to pay Debts and Legacies; for where  
there wants not, the question needs not  
be made. Yet a Servant or Factor, who  
 hath Wages for his Service, is not there-  
y made liable to satisfie for things in  
his custody stoln, because he hath not  
in this particular custody any com-  
pensation. So of an Executor, if  
perhaps benefit might accrue to him  
by the Executorship, as haply the dis-  
charge of a Debt owing by himself, &c.  
Other Cases there be wherein the Execu-  
tor will stand more clearly discharged. As

if the Testator left a Lease for years, sta-  
by Extent, Wardship, or other Good:  
whereto he had but a defeasible Title, an  
they be evicted after his death: so if he  
left a ship at the Sea with much Good  
and Merchandises, which are drowne  
in the return, never arriving in safety  
so also if he left a flock of Sheep taint-  
ed with the rot, which die shortly after  
him: In none of these three Cases, doubt-  
less, shall the loss fall upon the Executor.  
But to put a Case of more doubt; What  
if a Lease for years come to an Executor  
subject to a Condition for payment o  
Rent, or a sum in gross, and the Executor  
fails in payment; whether shall this loss  
fall upon the Executor to be made good  
to Creditors or Legatees out of his own  
substance, or not?

To this I must answer by this distinc-  
tion, *viz.* If the Executor had taken the  
profits of this Land so long as to furnish  
him with money for this payment, or if he  
had other goods of his Testator's in his  
hands to supply the payment, then is it  
his default that the money is not paid,  
and he must bear the smart thereof, o-  
therwise not; for he is not bound to make  
payment out of his own goods: yet he is

a ful-

aullen and unkind Executor who will  
it so doe, whenas he may repay and sa- Yet Quere.  
fie himself by the profits thereof after.  
ke Law, if the Executor suffer a Bond  
a hundred pound to be forfeit for not  
ying of fifty pound, having sufficient in  
hands. So also of a Recognizance,  
tute or Judgment, defeasanzed upon  
yment of a less sum. Yea, I less doubt  
all these cases, then of the Forfeiture  
the Lease for years : for haply the Ex-  
ecutor had time to have sold the Lease,  
and made money thereof, towards the  
ayment of Debts ; the omission and neg-  
t whereof may be imputed unto him,  
a Default justly occasioning recom-  
ence to be by the Law required from  
i. But, perhaps, he may excuse him-  
self that he could not find a Chapman who  
uld give him to the value thereof.  
ereunto yet reason can easily reply,  
t it had been much better to have sold  
nder the value, then to have lost the  
ole value, by exposing or abandoning it  
a total Forfeiture.

## C H A P . XI.

*How far and where an Executor, having Assets, is chargeable or liable to Action*

**H**Aving considered what things shall come to Executors, and be *Assets* in their hands for the performance of the Will; let us now consider what things the Executor is bound to pay, satisfy, perform, and what not, where he is chargeable, and where not, this being admitted that he hath *Assets*, viz. sufficient wherewith to perform.

Here we will consider of these parts.

1. *Of Debts by Specialty or Record.*
2. *Of Debts or Duties by Contract with Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

**T**ouching Debts by Specialty, which are the most usual and common obligations,

ligements, it will not be impertinent  
give a little light touching the validity  
of a Specialty, and the extent of it to  
executors. The most doubt will arise  
upon Bills and such Writings Obliga-  
tory made, not by Scriveners or Clarks,  
common form, but by others other-  
ise, for haste, or through simplicity.  
thus, long since we finde a Writing  
made by *A* to *B*, *Memorand.* that I have  
ceived of *B* ten pound, which I pro-  
mise to pay, &c. This being sealed and  
livered, was held a good Obligation by  
*ian* and *Catesb.* So if the words had  
been onely, I shall pay to *B* ten pound;  
whether such words, or the like, as con-  
nent or grant to pay, be in the form of a  
Bill or Bond, or in an Indenture or Ar-  
cles, it is a sufficient ground for an  
action of Debt. And though it should  
be mis-written, *Wigint* for *Vigint*, or fit-  
ten for fifteen; yet shall it be favoura-  
bly construed, and held a good Specialty  
of Debt, as hath been resolved in these  
and like Cases, and so also notwithstanding  
false *Latine* in the Obligation, or the  
plural number for the singular number,  
or words of repugnancy or non-sense;  
yet if there be words whereby it appears

22 E. 4. 22.

19 R. 2. F.  
Det. 166.9 H. 6. 7.  
2 H. 4. 8.

23 El. M. 5.

9 H. 7. 16.  
2 H. 4. 8.

28 H. 8.  
Dyer 22.

that *A* is a Debtor to *B*, and it be sealed and delivered, it is a good Writing Obligatory; yea, though it want the words of conclusion, *viz.* *In witness whereof*, a the Lord Dyer reports to have been resolved: although the contrary were held in four several Kings times before, as our Books shew.

28 H. 4. 17.  
11 H. 4. 76.

Now any such Writing obligator doth determine or drown any Duty by Contract, because Specialty is of a higher nature. So as if *A* and *B* do bargain with *C* to pay him a hundred pound for Corn or other thing, and after *C* take some such Writing obligatory as aforesaid of *A*: now by this is *B* discharged of the Debt because he stood charged onely by the Contract, which is extinguished by the said Specialty.

As for the extent and operation of these Specialties to and upon Executors, we must know that an Executor doth so represent the person of that Testator, and is so included in him, as that every Bond or Covenant by the Testator, made for payment of money or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor bind him and his

So reservation  
of Rent,  
grant of  
Annuity.

28 H. 8.  
Dyer 14, & 22.

47 E. 3. 22.  
52 H. 6. 32.  
50 H. 7. 18.

ecutors by express words, ( and yet the heir not named is not bound, though there be never so great *Assets* or Land descend unto him.)

No mention  
of Executor  
in the Judg-  
ment, yet he  
charged.

Now touching Debts upon Record which need not to be said, ( except of those by Stat.Merchant:) for to Debts and Damages already recovered against the Testator, and to Debts by Recognizance, the Executor's liableness is somewhat clear and conspicuous. Yet other iniour Debts upon Record may fitly be bought of, as Issues forfeited, Fines imposed by Justices at *Westm.* or at Assises, Quarter-Sessions, Commissions of Sewers, Bankrupts, by Stewards in Leets, or else like ; for all these are Debts of Record, which Executors stand charged withall. So also if the Testator were before Auditors found in Arrerages of account, being a Bailiff or Receiver ; for these Auditors are by Statute Judges of Record : but if the Account were made onely before the party to whom the Arrerage pertained , or but before one Auditor onely, it is out of the Statute, which speaks of Accounts before Auditors in the plural number ; therefore the Executor not chargeable , because the

9 H.6.f.11.  
11 H.4.64.  
92. Other-  
wise of a  
Gardian in  
Socage, he  
is out of the  
Stat. W.  
2.cap. II.  
ut credo. Co.  
l.10. 103.

the Testator might wage his Law in the Cases, not in the former.

And whereas exception was before made of a Debt by Statute-Merchant, was by reason that the Lord *Brook* tell us, that if the Conusor in that case be returned dead, no remedy appearerh for th Conusee to have Execution of the good of the Conusor , but onely of his Land. If this should be thus, it were a very mischievous Case : for many bound in Statutes have no Lands but Leases, and Good of great value, and if by their death their Goods and Chattels should be set free from this Statute , and the Credito without remedy, the Law were defective and it were so much the more strange in this Case, because the Statutes of *Aeton*, *Burnell* and *Mercatoribus* seem to pitch principally upon Goods , and to tend unto assurance between Merchants, who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the Goods as Lands of the deceased Conusor, appears by the Resolution of late made , in what Order and Precedence Statutes are to be satisfied by Executors, as after we shall see.

26 H.8. Br.  
Stat. Mer.  
43.

Of

*f Debts by Contract without Deed, as  
Leases parol, &c.*

Contracts are of divers kinds, and we will begin with those in the ready, as most worthy. If therefore one be lessee for years or for life, without any indenture or Deed, (as he may be) and, his Rent being behind, he dieth; now is the Executor liable to the payment of his Rent without any Specialty, for that his Testator, if he had been sued in his life-time, could not have Waged his law. But if the Lessee for years in his life-time sell or grant away his Term or lease, although he still lie at the stake for the Rent to grow due after, untill the Lessor accept the Assignee for his Tenant; yet if the Lessee die, his Executor shall not be charged for any Rent due after the death of his Testator. But what if the Lessee do not alien or assign his Term, but die thereof possessed, and the Executor, perceiving the Land not to be worth the Rent, waveth the same, yet the Lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the Executor with the Rent

21 H. 6. 1.  
44 E. 3. 42.

44 E. 3. 5.  
7 E. 3. 11.  
14 H. 7. 4.  
per Kebble.  
Vide 8 E.  
Dy. 247.

M. 32. &  
33 Eliz. in  
com. b.s.

Do. & Stud.  
121.

Rent during the Term ? I answer, th<sup>t</sup> if he have *Assets*, that is, sufficient for payment of this and other Debts, he can not wave this Lease, but shall be tied to answer this Rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of a Obligation to pay money : Yet because it is yearly Executory, the Executor may wave it, in case his Testator's Estate will not supply and bear that losse. But what if there be *Assets* to bear this yearly losse for some years, but not during the whole term ? I think in this case the Executor must pay the Rent so long as these *Assets* will hold out, and then must wave the possession, giving notice to the Reversioner. And this I think he may doe well enough, notwithstanding his Occupation of the Land divers years after the Testator's death, because that was not voluntary, but as of necessity : yet this I leave as a *Quare*, to be well advised of with good counsel.

*Of Contracts personal:*

W<sup>H</sup>ere the Testator might wage his Law, there the Action lieth not against

uinst the Executor, as hath been touch-  
d: and therefore he is not chargeable  
in an Action of Debt upon a simple  
Contract, as by reason of this or that, to  
the Testator; yea, though it were the In-  
heritance of Land which was sold, so as  
the Sale were without Deed; or though  
there were no Deed, yet if no Counterpart were un-  
t the hand of him to whom the Sale  
is made. And the Custom of *London*  
the contrary, *viz.* that an Action of  
Debt should be maintained against Execu-  
tors upon a Contract, was held void, at  
st no good Plea against other Credi-  
ts, that such a Debt was recovered against  
the Executor, or paid by him; as was to-  
wards the latter end of the late Queen's  
reigned, though in the beginning of  
her time it was a Demurrer. Yea, though  
a Debt grew for the most necessary  
*viz.* meat and drink, which bind-  
even an Infant to payment, yet will it  
not charge the Executor of a man of full  
age. But this is meant where the Con-  
tract was onely by word: for where the  
Testator putteth his Seal to any Deed or  
Writing made upon such Sale, this is more  
than a simple Contract, and taketh from the  
lendee his wager of Law, and so chargeth  
the

41 E. 3. 13.

15 E. 4. 25.

Except by a

*Quo minus*

in the Ex-

chequer. So

the Dug's

Debter. Co.

1.9. f. 98.a.

So of Ac-

counts, ex-

cept for the

King.

M. 32 &amp;

33 El. in

com. ba. by

three Judg-

es, and 37

El. by all,

as I find in

my Report.

But Co. 1.9.

f. 82.b. it is

contrarily

reported.

3 El. Dy.

196. De-

murrer.

9 E. 4. 51.

10 H. 7. 8.

15 E. 4. 16.

22 H. 6. 13.

39 H. 6. 186.

There  
though a  
common  
Hostler or  
Vicualler  
trust his  
Guest, he lo-  
seth his Debt  
by his death.  
**Co. 9. 87. b.**  
**12 H. 4. 23.**  
But if the  
sum be also  
written on  
it, they are  
bound as by  
a Deed.  
**28 H. 8.**  
**Dy. 2. a.**  
**Slade's Case.**  
**Co. lib. 4.**  
**Co. 1. 9. 87.**  
**Pincbon's**  
**Case.**

**2 H. 4. 14.**

the Executor. But if the Testator se-  
but unto a Tail or Tally with scotche  
expressing a Debt, this is no such Spec-  
alty as shall charge Executors. Yet i  
some Cases without any Seal at all th  
Executor is chargeable. But althoug  
no action of Debt lieth against the Exe  
cutor upon such a simple Contract , ye  
may the Creditor in that case maintai  
an Action upon the Case , grounde  
upon the Assumption implied, thoug  
not expressed, as now standeth resolved  
by all the Judges of all the Courts a  
Westminster , though heretofore ther  
hath been much difference of opinio  
thereabout. And indeed, thus the Exe  
cutor is charged in matter for a simpl  
Contract , though not in manner of  
Debt , but as for breach of promise, ma  
king recompence in Dammages , in stead  
of the Debt. And the chief reason for i  
is , because the Testator could not have  
waged his Law in this Action upon the  
Case against himself , though in Deb  
he might. Where the Testator retaineth  
Servants in Husbandry , or otherwise  
and dieth , there being Wages due to  
these so retained ; the Executor is lia  
ble to an Action of Debt for the same  
b)

reason that the parties were compelled by Statute thus to serve, and therefore the Testator could not have waged Law : but in case of Servants not compellable, as Waiters or Serving-men, as call them, no Action of Debt lieth against the Executor for their wages, though against the Testator himself it doth; for the Contract is sufficient to charge him who made it. See of *Account* after.

Where Executors shall be charged, without either Contract or Specialty.

Where a Prisoner oweth money to a Gaoler or Keeper of Prison for his Diet or Victuals, and dieth, Executors shall be chargeable for this debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them Victuals.

so where one hath a Patent or Tally the Exchequer, to receive money of one Customer, Receiver, or other Officer of the Crown, and delivereth it to him, he then having money of the King's in his hands; if he pay not the same, but die, his Executors shall stand char-

4 H. 6. 48.

So 2 H. 4. f.

14. Servitors  
in the War  
by Contract.

27 H. 6. 4.

15 E. 4. 16.

Co. lib. 9. f.

87. b.

No. n. br.

121. a. He

must have a

Liberate

also.

27 H.6.4. b. chargeable with the payment thereof.  
 1 H.7.17. for Arrerages of Account before Audit  
 2 H.7.8. b. if more then one ; but this is Debt of  
 Clark of the Hamper.  
 10 H.6.24, cord in Law.

25.

No. na. br.  
 82, 83.  
 Westmin. i.  
 c. 35.  
 Lib. Intr.  
 172. b.

Reg. orig.  
 141.

22 R.2.16.  
 p. 2.

So if any Lord of free Tenants levy Aid of them for the marriage of eldest Daughter , and he die before be married ; she may recover this by an Action of Debt against his Executor: but this is by virtue of a Statute. There is a President in the Book of Entries an Action of Debt against the Executor an Heir , by which it seems that a binding himself and his Heirs , and giving Assets , the Heir taking the pri becomes so a Debtor , that his Executor shall be charged. And in the Regi there is a Writ against the Executor the Guardian of the Spiritualties of Arch-bishop of York , for the Debt B , who died Intestate , and wh Goods came to the hand of the Guardian, viz. the Dean of York. allowance whereof , there is a Note alledged of the like Writ brought in K. R. his time , and that then a President alledged of such a Writ in King Edw. his time against the Executors of Ordinary, and that they were infor

answer unto it. So is the opinion of *rex*, in the time of *Edward the third.* *Ald.* opposeth him. Also the *Rati-*  
*abili parte bonorum* by custome in some  
aces is māintainable for the Wife and  
hildren against the Executor. But no  
ction of Account lieth against Execu-  
rs, except for the King. More hereof  
t. Wrong.

II E.4.Fit.  
Ex. 77.  
See Co. lib.  
Intr. 564.  
Such Actions  
in York-shire.

### *Of Covenants charging Executors.*

WE have already touched upon  
Covenants in part, *viz.* where  
ey be expressly for payment of money,  
ewing them to be in Law-bonds, that  
Writings obligatory, whereupon an  
ction of Debt may be brought as well as  
Action of Covenant, though the words  
the Deed bear the sound and phrase of  
Covenant. Yet in some Cases no Action  
Debt lieth upon a Covenant to pay  
oney: as if *A* covenant that his Execu-  
or shall within a year, or such a time, af-  
ter his death pay ten pound to *B*; now  
that no Action of Debt was main-  
inable against *A* himself, it lieth not  
against his Executor, but onely an Action  
Covenant; as was held in the late

Inter Ann.  
drews &  
Elserig, circa  
citer 33 Eliz.

Pasch. 33 Eliz.  
inter Bor. &  
Austin, in  
com: bar

*Quæ.* If both  
be to be  
done by the  
Covenanter,  
*viz.* ten £.  
if not five,  
such a day.

So in *Penot's*  
Case. But  
where the  
Lessor did  
covenant to  
pay the  
Quit-rent,  
divers Justi-  
ces thought  
the Execu-  
tor, not na-  
med, was  
not bound;

*1 & 2 F. &*  
*M. Dyer*  
*114.* Note  
the Case is  
*supra in-*  
*marg. Pafch.*  
*35 El. in*  
*ba. reg.*

Queen's time. So if the Covenant be conditional, as thus, that if *C* do not pay to *B* ten pound, then *A* will pay it: and so also, perhaps, if the Covenant be in the distinctive, *viz.* to doe such an act, or pay ten pound: now if the Act be not done, yet no Action of Debt lieth for the money, but onely an Action of Covenant. But now let us come to the Cases meer Covenants, and see which of them will charge an Executor, and which not. a Lessee for years covenants to repair the Buildings, or to pay the Quit-rents issuing out of the Land let, there is little doubt but the Executor, to whom the Term cometh, must as well as his Testator perform that Covenant, although he did not covenant for him and his Executors. And yet of these Cases doubt hath been: an touching the latter, *viz.* of paying Quit rents, divers Justices in Queen *Mary* time were of opinion, that it was a thing so personal, that it died with the person and did not charge the Executors; nor there any contrary Opinion expressed in the Book. And since that time, *viz.* towards the end of Queen *Elizabeth* Reign, in the Action of Covenant between the Dean and Canons of Windsor

and

and *Hide* touching Reparations, at the  
first much opinion was, that onely the  
erson Covenanting was tied to this per-  
formance; but after it was resolved, that  
at Covenant did run with the Estate, and  
both Executor and Assignee were bound  
performance. But in that Case it was  
ld by *Popham*, chief Justice, that if the  
ovenant had been to doe a collateral  
t, neither the Executor nor the Af-  
nee had been tied thereby: and there-  
e where a Lessee for years covenants  
thin such a time to build a new House  
on the Land, and dies before that time  
pired, I doubt whether the Executor be  
und to perform this or not; although  
do concern the Land let, so as perhaps  
the Rent or Fine was the less, in respect of  
us charge of new Structure or Buildings;  
which is a great reason that the Execu-  
r, though not named, should be tied to  
e performance. But if the Covenant  
d been to build a House elsewhere than  
on the Land let, or to doe any other col-  
leral thing, not pertinent to the Land  
t; it is clear the Executors were not  
ound to perform it. And yet in those  
ases, if there were a breach or non-  
erformance in the Testator's life-time,

Co. l. 5. f. 24.

Resolved

P. 39 Eliz.

but not ad-  
judged till

M. 43 &amp; 44

Eliz.

*Tr. 28 H.8.*  
*Dyer 14.*  
 There the  
 House was  
 to be built  
 upon the  
 Land leased;  
 and yet *Baldus*  
 seemed  
 of a contra-  
 ry opinion.

*M. 8 & 9*  
*El. Dy. 257.*  
*Intrat. M. 7*  
 & 8 Eliz.  
 Swanno  
 Vest.  
 Strangham  
 & Seakes.

as that the time of performance were expired before his death, then it is clear the Executors were bound to yield recompence by way of damages recoverable in Action of Covenant, as both *Shell* and *Fitzherbert* agreed: and so also did the Lord *Popham* agree in the said Case of *Hide*, as I find in my own Report that Case; though in the Lord *Coke*, reporting onely the Point in question, there be not mentioned. Now let us consider of the Case where there is no express Covenant at all, so much as for the Lessor himself, but onely a Covenant implied or Covenant in Law, as we call it. As Lessee for life make a Lease for year and die within the term, so as the Lessee evicted by him in Reversion or Remainder. In this Case it was resolved in the late Queen's time by three Justices, viz *Walsh. Brown* and *Dyer*, that by this Covenant in Law the Executors were not chargeable; and in the same Case, the Lord *Dyer* sets down another Resolution after to the same effect. But Master Serjeant *Bendloes* reporting this latter Case to be of a Lease made by Tenant in Tail, viz. before the Statute of 32 H. 8. is not warrantable by it, sets down the opinion

contrarily, *viz.* that the Action was  
maintainable against the Executor. This  
may serve for instance, the like being in  
another Case where the Lessor hath not  
good and a firm Title, but perhaps sub-  
ject to a Condition, or other Eviction, so  
the Lessee cannot enjoy the Land ac-  
cording to his Lease.

Tr. 22 El.  
rot. 459. in-  
ter Brode-  
ridge &  
Windsor.

But this must be so understood, that no  
Action or breach of Covenant is in the  
power of the Testator himself; for if that be,  
there is no question but the Executor  
is chargeable: and therefore if one  
make a Lease of Land by Deed wherein  
it hath nothing, this Covenant is per-  
haps presently broken; and though the  
Lessor die before an Action of Covenant  
brought, it will be maintainable against  
the Executor, though no express Coven-  
ant. This is usefull to be known, though in  
these days there be few Leases so made,  
without express Covenant, and the Execu-  
tors also named. And where there is a  
special Covenant in express words, it doth  
qualifie the Covenant implied: so as al-  
though words of demise and grant tie the  
Lessor to a general Warranty of the Title  
against all men, yet it being after covenan-  
t that the Lessee shall enjoy against the

Notes and  
Anders  
Case.

Lessor and his Heirs , or against all claiming under him or his Ancestors ; now reversion by or under any other Title giveth cause of Action, or bindeth the Lessor or his Executor to make recompence

*Of Wrongs done by Testators, and whether  
Executors be liable to Amends.*

**A**lthough Executors do represent the persons of their Testators; yet if the Testator commit any Trespass upon the Goods of another, or upon his Person or Lands , no Action lieth for this against the Executor ; for *Action personalis moritur cum persona*. So if a Sheriff, Gaoler or Keeper of Prison, suffer one in Execution for Debt or Damages to escape though hereby the party at whose Suit the Execution was be intituled to an Action, viz.. an Action upon the Case, again such Officer by the Common Law , and by Statute an Action of Debt ; yet if he so suffering die , for that such difference was a wrong of the nature of a Trespass no Action lieth against his Executor for the same. And upon the same reason, as presume, if one carry away his Corn and Hay, without setting out the Tenth , a though

<sup>41</sup> Ass. p. 15.  
<sup>40</sup> E. 3. Fitz.  
Ex. 74. Co.  
lib. 9. f. 87. 1.

ough the treble value be recoverable against him in an Action of Debt ; yet if he die before such recovery , the Action is gone, and lieth not against his Executor ; but, not although the Testator were a lessee for years, so as his State came to his Executor.

Like Law in other penal Statutes : as, for arresting one at the Suit of *F S*, without his privity or assent ; or for not appearing as a Witness, being served with a *sub-pœna*, and having charges tendered, and many like ; yea, if a Lessee for years commit Waste and die , no Action lieth against the Executor for this Waste. For these Cases are within the rule of *Action personalis moritur cum persona*. And many other like Cases might be put , but these may suffice. Yet if a Parson, Vicar, or other Spiritual or Ecclesiastical person , to suffer a ruine or decay of the Houses or buildings upon his such Spiritual Bene-  
ce or Promotion, and dieth ; his Executors are liable, by the Spiritual or Ec-  
clesiastical Law , to the Successor's Suit  
or amends, to the repairing of such spoilt  
or decay. And because some used frau-  
dulently to grant away their Goods, so as  
nothing shall be left to their Executors ;

<sup>13 Eliz. c. 16.</sup> it was enacted *temp. Eliz. et hæ.*, that su-  
Grantees of Goods should be liable  
the Successor's Suit for these Dilapidation  
as if they were Executors.

As for one other Case of this natur  
*viz.* where an Executor wasteth the Goo  
of his Testator, or an Administrator the  
Goods of his Intestate, and dieth, whi  
ther his Executor be subject to Action for  
this, or not; I adjourn the Reader to th  
place where I shall treat of such Wastin  
or Devastation by Executors.

<sup>Fitz. Ex. 77.</sup> Unto this Head not unfitly may be re  
ferred what before is said of Action  
against the Executors of the Debtor  
Heir, and the Executors of the Ordinary  
for the Specialty binding to payment  
reacheth not to any of these: but because  
their Testators should have paid their  
Debts with the Goods or Profits of th  
Lands of the Debtor, and did not, but  
retained them to themselves; therefor  
for this, as a Wrong, are they suable, as  
take it. So also by the same reason are th  
Executors of an Administrator chargeable  
where he did neither pay the Debts, nor  
leave the Goods to the next Administra  
tor, but otherwise disposed of them. Ye  
an Executor is not chargeable in an A  
ction

I conceive  
no differ-  
ence be-  
tween this  
and the o-  
ther Cases  
*supra.*

ton of Detinue, nor of Account, (except  
the King) for the Testator's detaining,  
ad not paying or answering things recei-  
vd, or under his charge.

2 H. 4. 13.  
He may by  
admit. Co. L.

11. f. 88.

3 H. 6. 35.

Con. for Ar-  
rerages of  
an Account  
before Au-  
ditors.

11 H. 5. 64,  
91, 92.

9 H. 6. 11.

13 Ed. I.

And the reason why, after Account  
made before Auditors, and the Bailiff  
(Receiver be found in Arrerages and  
c, that in this case his Executor is  
chargeable, is, because the Auditors are  
made Judges by the Statute *Westm. 2. cap.*  
to this Arrerage which they have  
judged is a Debt by Record.

But if the Case be put on the other  
side, viz. that the Bailiff or Receiver  
be found in Surplusage upon his Ac-  
count, viz. that he hath laid out more in  
his Lord's or Master's business than his Re-  
ceipts amounted unto, and then his Lord  
or Master dieth; now shall not he have  
by Action against the Executors for the  
surplusage, because it is out of the purview  
of the said Statute.

Co. 11b. 9. f.  
87. a.

## CHAP. XII.

*Of the Order and Method to be used by Executors in payment of Debts and Legacies, so as to escape a Devastation charging of their own Goods.*

VVE have gone through and dispatched the two first propose parts, viz. 1. Touching the being Executors, and the manner of their being; 2. Their having, and the manner of their having. We come now to the third part, viz. Their doing or disposition of the Testator's Estate.

Now this consists principally in the issuing of Money, though partly also in delivering or assenting to the execution of Legacies, not being Money, but other Goods or Chattels bequeathed.

Money is to be issued by Executor four ways ordinarily.

About the Funeral of the Testator.

About proving his Will.

In paying of Debts.

In paying and satisfying of Legacies peculiarly.

As for the first , Burials be as of necessity for two respects, viz. 1. Of Charity to the dead, that he may be Christianly and seemingly interred 2. to prevent and avoid annoiance to the living, so by the very view of the dead Carcasses would both be affrighted, and within a few days distasted at the nose. We know that under the Law the touching of a dead Carcass made a man unclean, and to need purifying : nor can we easily forget what the Sisters of *Lazarus* said to our Saviour touching their Brother, when he had been dead three or four days, viz. that the taking of him then out of his Grave must needs bring a noisome favour. Hereabout therefore some expence is necessary , and that not onely for Fees to be paid , which in *London* amounts to a considerable sum , specially for such as are to be buried within the church; but also otherwise, viz. for the pall or Herse-cloath , the Ringing, &c. as for Feasting and Banqueting, it seems not to be congruent to the sadness and solemnity of the action in hand. But whatsoever that be, yet where the Testator leaves not sufficient Goods to pay his Debts, Festival expence is to be forborn,

except the Executor will out of kindne  
bear it with his own purse ; for dea  
Debtors must not feast to make their l  
ving Creditors fast. I mentioned a con  
derable amount of funeral Fees payabl  
in *London* : and surely (to let my thought  
fall back uponit a little ) it is worth con  
sideration, whether in that kinde, and e  
specially for those who dying there ar  
yet carried into their Countries to be bu  
ried, the Exacton be not either unjust al  
together, or too onerously excessive : se  
also for much Ringing , contrary to the  
Canon made at the Convocation in the  
first year of King *James*.

The next thing mentioned to justifie  
and occasion expence is the proving of  
the Will. But this way a greater dis  
bursement (except for riding charges, or  
by reason of opposition by a *Caveat* put in,  
or the like) will not stand allowable, then  
is prescribed by the Statute made in the  
time of *Hen. 8.* whereby the Fees of Or  
dinaries, and their Scribes, Registers and  
Officers be limited. And it it is strange  
that these bounds have been so much and  
so frequently broken and transgressed ; the  
rather, for that long before, in the time of  
*K. Edm. 3,* by an Act of Parliament it is

*21 Hen. 8.  
cap. 5.*

*13 Ed. 3.  
c. 4.*

pro-

provided, that the King's Justices should, as well at the King's Suit as at the partie's grieved, enquire after such Oppressions or Tortions, for so they be called ; yea, *St. Cm.* who was no stranger to the Civil Canon Law, as appears by his Book, saith, that the Ordinary ought to take nothing for the Probate, if the Goods suffice not for Funeral and Debts ; but he means surely that Conscience is against it.

*Do. & Ste.  
I.2.cap.10.*

Now we come to the third occasion of Disbursement, *viz.* payment of Debts, which is the main part of our busines. We have before seen what Debts lie upon Executors, having *Assets* to pay them ; we are now to see in what order they just pay them, as well *ut fint fide dispensares*, as for their own indemnity, *ne quid sua capiat detrimenti*. To put our selves to the better order or Method of handing these things, we will sort our Debts into their several kinds, thus.

They are of these three sorts, *viz.* either Debts of or upon Record ; Or, Debts by Specialty ; Or, Debts without Specialty.

The Debts upon Record may be again divided into four sorts or kinds, *viz.*

Debts to the King or the Crown.

Debts

Debts by Judgment or Recovery  
some Court of Record.

Debts by Recognizance.

Debts by Statute-Staple, or Statute  
Merchant.

Amongst these, the Debts of the Crown are to have the first place of precedence so as if there be not come to the Executor Goods of greater value then will suffice for the satisfaction of these, he not to pay any Debt to a Subject; and he be sued for any such, he may plead Bar of this Suit that his Testator did thus much indebted to the King, shewing how, &c. and that he hath not Goods summounting the value of that Debt. Or if the Subject's pursuit be not so by way of Action, as that the Executor hath dare in Court to plead, but be by way of suit Execution, as upon Statute-Merchant or Staple; then is the Executor put to his *Audita quærela*, wherein he must set forth this matter. And there is great reason why the King's Debts should thus be preferred before any Subject's, viz. for that the Treasure Royal is not onely for sustentation and maintaining of the King's Household, but also for Publick services as the Wars, &c. as appears by the Statute

M. 33 & 34  
Eliz. the  
Lady Wal-  
singham's  
Case in com-  
ban. & Tr.  
39 Eliz.

10 Rich. 2. cap. 1. And therefore it  
as I conceive, that *Bracton* saith of the *Lib. 1.*  
treasures or Revenues Royal, *Roborant  
onam*, they do strengthen or uphold  
Crown. And for the like Reason, as  
I think, did God enact touching the  
essions of the Crown, that if they  
re given to any other then the King's  
Children, they should revert and  
he back to the Crown the next Jubi-  
which was once in fifty years. *Sed de  
satis.*

But this priority of payment  
the King's Debt before the Debt of any  
object, is to be understood onely of Debts  
or upon Record due to the King, and  
of other Debts. If any ask how the  
King should have any Debts which shall  
be of Record, since by the Statute  
of King Hen. 8. chap. 30. it is in-  
ed, that all Obligations and Specialties  
en to the use of the King shall be of  
e same nature as a Statute-Staple : To  
s I answer, that there may be sums of  
oney due to the King upon Wood-  
es, or sales of Tin, or other his Mi-  
rals, for which no Specialty is given ;  
also for Amercements in his Courts-Ba-  
n or Courts of his Honours, which  
not Courts of Record ; the like of  
Fines

21 E. 4. 21,  
22. So must  
it be plead-  
ed M. 33 &  
34 Eliz.

Fines for Copy-hold Estates there; the money for which Strays within King's Manors or Liberties are sold, so, as the Law hath lately been taken ruled in the Exchequer, even Debts Contract due to any Subject are by Outlawry, or Attainder, forfeitable to the Crown. Yet neither these, nor the debts due to such person out-lawed or attainted by Bond, Bill, or for Arrearage of Rent on Lease, are or can be any Debt of Record, untill Office thereupon found; although the Outlawry or Attainder upon Record, yet doth it not appear any Record, before Office found, that such Debt was due to the person outlawed or attainted. Thus are not these Debts to the Crown to have priority of payment before the Subject's Debts, tho' the King's Debts of Record are so to have.

*And must plead the Record in certain, as was held in the Case of the Lady Walsingham, M. 33 & 34 Eliz. But it sufficeth to say, by a Record of the Exchequer, as was held Tr. 39 Eliz. in ban. Reg.*

So that if a Subject to whom the Testator was indebted by Specialty sue for the Debt, the Executor must plead, that the Testator died indebted thus much to the King by Record, more then which he had not Goods to satisfie; if the truth of the Case be so: for if there be sufficient to satisfie both, then the Subject Credit is not to stay for his Debt till the King

De

bt be levied. And if the Subject Creditor sue Execution upon a Statute, so that Exec. hath no day in Court to plead its Debt to the King, then is the Exec. to an *Audita querela*, wherein he first set forth that matter, and so provide his own indemnity. But what shall we say of Arrerages of Rent due to the King? Surely, where it is a Fee-farm Rent, or other Rent of Inheritance, I see not how it can come under the title of Debt, since for it no Action of Debt is maintainable so long as the State continue in him to whom it grew due; and I find by the L. Dyer, M. 14 Eliz. said, that the King could but onely distrain for his Rents, and not otherwise levy them of Lands or Goods; and that the King by his prerogative may distrain in any other goods of his Tenant, our Books tell us, but more. Yet I know it hath been otherwise done of late in the *Exchequer*, which ift have been the ancient and frequent of the *Exchequer* it will stand as Law, though unknown to the L. Dyer. Now Rent upon a Lease for years differeth from the other, since for the Arrer. thereof an Action of Debt lieth. But how can either of these be debts of Rec. when the not payment may

be either in the Court of Exchequer, to the Receiver general or particular? and how then can there be any certain Record of the non payment, so as to make any certain Debt upon Record? We know Statutes have been made to make Lands of Receivers subject to sale for satisfaction to the Crown; and besides these some ancient Patents direct the payment of Fee-farms into the hands of Sheriffs. The Stat. of Westm. i. cap. 19. provides remedy for the King against Sheriffs answering the Debts of the Crown them received: so as the King's Farm or Debtor may have paid his Rent, or their Debt, and the Crown have not yet received it. Of Fines and Amerciaments the King's Courts of Record, there is doubt but they are Debts of Record.

Come we now to the Debts of Subjects and first those of Record. Touching which I shall not be able to hold so good a Method, and so well to handle things by parts as I would; for that the parts so stand in competition one with another for pre-  
dency, as that they must of necessity thereabout conflict and interplead each with the other, and contest one against the other: yet for the Reader's better ease, a  
abil.

ability to find out that which may concern him in his particular case, I will, in the best sort I can, single out these things into several parts, and place them in several rooms or stations. First considering how it shall stand between one Judgment and another, had either against the Executor or Testator. Secondly, how between Judgments and Statutes or Recognizances. Thirdly, how between Recognizances and Statutes. Fourthly, how between one Recognizance and another. Fifthly, how between one Statute and another. Adding to each some Observations incident.

Now, next to the Debts of the Crown, are Judgments or Debts recovered against the Testator to have priority or pre-  
cency in payment, as being of an higher  
nature or more dignity then any other :  
for that Statutes and Recognizances,  
though they make Debts upon Record, yet  
are they begotten but by voluntary con-  
sent of parties ; whereas in every Judg-  
ment there hath been a course and work  
of Justice against the will of the Defend-  
ant presumed, and this in a Court of Ju-  
stice, and the Records of such Judgments  
are entred in publick Rolls , not kept or  
carried

Co. l. 5. f.  
281. So Wray  
and Gaudy,  
inter Bond  
and Bales,  
28 El. vel  
circiter.

Yea though  
a Writ of  
Error by the  
Exec. to re-  
verse the  
Judgment,  
yet suffering  
a Stat. to be  
executed,  
must pay of  
his own.  
Read and  
Beachlock's  
Case, P. 43  
Eliz. Barre.  
So held in  
Reaa's Case  
sup. a. Vide  
12 H.7. Kel.  
24, 25. to  
like pur-  
pose.

Co. lib. 4. f.  
59. So Feri-  
am in com.  
ba. inter  
Chernock &  
Winsley,  
24 Eliz. vel  
circiter.

carried in Pockets or Boxes, as Statutes, as  
untill Inrollment Recognizances are.  
Therefore Executors must take heed that  
Judgments against their Testators, (before  
Debts any other way) if they have not suf-  
ficient for both, be first satisfied, lest they  
draw the burthen of this Debt upon their  
own backs. Now their way to help them-  
selves, being sued or pursued for othe  
Debts, is the same before delivered touch-  
ing Debts upon Record to the Crown, viz  
by Plea, where they may plead, as in *Scir*  
*facias* upon a Recognizance, or Suit upon  
Band; and by *Audita querela*, where they  
cannot plead, as when Execution is sue-  
upon a Statute. And if they had no war-  
ning in the *Scire facias*, but upon *Nib*  
returned the Judgment passed, there all  
the Exec. may be relieved by *Audita qui-*  
*rela*; because there was no default in him  
that he did not plead, or set forth the  
Judgment upon the Suit in the *Scire facia*.  
Nor will it be any Plea for the Creditor to  
Stat. to say, that his Statute was acknow-  
ledged before the Judgment, and so more  
ancient; for a latter or more puissant  
Judgment is to be preferred before  
Statute in time precedent. But if the  
Judgment be satisfied, and it onely kej

a foot to wrong other Creditors, or if  
there be any Defeasance of the Judgment  
yet in force; then the Judgment will not  
avail to keep off other Creditors from  
their Debts. And thus much touching  
Debts by Judgment, *viz.* how they stand  
in priority before other Debts by Statute

*Co. L. 5. f. 28.*  
*Co. L. 8. f. 132.*  
So held in  
15 & 16 El.  
So in the  
*Scire Facias*  
by Bond a-  
gainst Bates  
it was held

of Recognizance. Now to see how they  
and among themselves, let this be ob-  
served, *viz.* that between one Judgment  
and another had against the Testator  
precedency or priority of time is not ma-  
terial; but he which first sueth Executio-  
n must be preferred, and before any Ex-  
ecution sued it is at the election of the  
Exec. to pay whom he will first: yea, if  
such bring a *Scire facias* upon his Judg-  
ment, the Exec. may yet confess the Action  
of which he will first, notwithstanding  
the *Scire facias* was brought by the one  
before the other. In this *Scire facias* the  
Defendant may plead generally, that he  
 hath fully Administred before the *Scire  
facias* brought, without shewing that he  
 did administer in payment of Debts of as  
 high nature; yet that must be proved up-  
on the Evidence, else the Trial will fall  
out against the Exec. Thus have I deliver-  
ed the most material things, in my appre-

hension, touching Debts by Judgment; yet thereabout I will add, for the better information of the Reader not studièd in the Law, these few things. First, that which hath been said is onely to be understood of Judgments against the Testator, and not of any against the Executor himself for of those, being but Debts of Special at the time of the Testator's death, I shall speak after. Secondly, what is said of the Testator, in case of an Executor immediate, is likewise to be understood of the Testator's Testator, in case of the Executor of an Executor: for where A makes B Exec. and B makes C Exec. the Goods which came from or were left by A, be not in the hands of C liable

<sup>9E.4.14,15.</sup> <sup>Quere, or</sup> Judgments had against B; nor, on the other side, are the goods of B in the hands of C subject to the Judgments had against A. And the like is to be understood of Statutes, Recognizances and Bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or Judgments by meer confession, without defence, are yet of the same nature, and to have the same respect, as other Recoveries upon Trial or otherwise for although they may seem to be but of the nature of Recognizances, which be debi

<sup>Arrerages of Account before Auditors without Suit; for the Executors are charged by Judgment of the Auditors by Stat. W. 2. Judgment of Record.</sup>

<sup>10 H.6.24,</sup> <sup>25. Bre. det.</sup>

<sup>183.</sup>

cognita ; yet do they differ from them, that here a Debt is demanded by a Declaration which is intended true, and that therefore the Defendant cannot deny it ; but in case of a Recognizance it is not so, for there usually no Action is entred, nor Debt demanded. Fourthly, the foresaid respect to Debts by Judgment is not to be inclosed within *Westminster Hall*, and is restrained to the four Courts there, but may and must extend it self to Judgments in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter or Prescription to hold plea of Debt above forty shillings, as in London, Oxford, &c. For although there Execution cannot be had of any other Goods than such as be within the Jurisdiction of that Court ; yet if the Record be removed into the Chancery by Certiorari, and thence by *Mittimus* into one of the Benches, so Execution may be had upon any Goods in any County of England. Fifthly, in Case where the Testator was bound in a Recognizance, and a *Scire facias* brought against him, and thereupon Judgment given ; although this Judgment be not, *quod recuperet*, as in case of Actions of Debt, but, *quod habeat executionem* ;

*Quare of  
Judgment in  
a Writ of  
Annuity for  
Arrearages  
after,*

nem; yet since Execution is the life, frui  
and effect of all Judgments, this may now  
well stand for a Debt by Judgment, as I  
take it.

### Of Recognizances and Statutes.

**N**ext unto Debts by Judgment are  
those by Stat. or Recognizance to be  
regarded by the Executor. And because  
I find no difference of priority or prece-  
dency between these two, I therefor  
rank them together: Yet one reason of  
preferment given to Judgments before  
Statutes in *Harrison's Case*, viz.. that th  
one remains a Record upon a Roll in th  
King's Court, whereas the other being  
carried in the pocket of the Conusee  
more private; this, I say, should give pri-  
ority also to Recognizances before Sta-  
tutes: As also another reason, for that Sta-  
tutes are not properly Records, but Ob-  
ligations recorded; yet do I not find th  
this makes a difference for priority of  
payment. And indeed the Stat. is the more  
expedit remedy, since thereupon Execu-  
tion may be taken out without a *Scire fa-*  
*cias* or other Suit, which cannot be in th  
case of a Recognizance: for there, if a year  
be past after the Acknowledgment, no  
Execution can be sued out against th

part

ty himself acknowledging it, without  
Scire fac. first sued out against him; and  
he be dead, then though the year be not  
full, yet must a *Scire facias* be sued, and  
thereupon the Executor Defendant may  
read some Plea to hold off the Executi-  
for a time. But, this notwithstanding,  
the Executor may satisfie the Recogni-  
tance before the Statute, at least if he do  
before Execution sued thereupon; for  
they standing in equal degree, it is at his  
election to give precedency and prefer-  
ence to whether he will. Neither is it  
material which of them were first or more  
ancient; nor between one Statute and ano-  
ther doth the time or antiquity give any  
advantage as touching the Goods, though  
touching the Lands of the Conusor it  
doth; but as for his Goods in the hands  
of his Executor, whosoever first getteth  
hold of them by his Execution, shall have  
the preferment. And before suing of Exe-  
cution, the Executor may give precedence  
or preferment to whom he will. But now  
some may object, that there is no course  
nor Writ of Execution for any such Conu-  
ee against the Executor; and if so, then  
Statutes-merchant and of the Staple are in  
vain spoken of, and it is true that Master

Before *Sci. fac.*  
not after  
voluntarily,  
but if levied  
by Writ of  
Extend. is  
good.

Brook,

Bro. No. c.  
294. & Stat.  
Mer. 43.

Co. l. 5. f. 28.  
b. H. 30  
El. rot. 119.

P. 32 El. rot.  
235. in co. b.

*Brook*, after Chief Justice of the Common Pleas, in his New Case, professeth that he knew not any remedy for the Creditor out of the Goods of the Conus after his death. But if this should be so the Law were very defective, since the substance of many, especially of Merchant for and among whom the Statute-Merchant was provided, consisteth usual more in Goods then Lands: besides, the Plea of *Harrison*, Administrator of the Goods of *Sidney*, in Bar of *Green's* Action of Debt upon an Obligation, viz. that the Intestate stood bound in a Statute-staple to *FS*, and *Green's* Reply thereunto that there were Indentures of Defeasance, no Covenant whereof was broken, and the Resolution of the Judge that the said matter in the Replication was good to avoid the Defendant's Plea all this, I say, (and the Resolution of the Judges of the Common Pleas in that Case and in the Case between *Pemberton* and *Barram*, as also in the King's Bench before *Popham* and the rest of the Judges, that Executors must satisfie Judgments before Statutes, and Statutes before Obligations) had been idle, and favouring of grosse ignorance, if no Execution al-

could be had against the Executor of See Co.lib.5.  
n bound in a Statute; and then should 91. Executi-  
~~een~~ have demurred upon the Plea of on against an  
~~arrifon~~, and needed not to have pleaded Exec. upon  
ut other matter: but none of the Judges a Statute.  
Serjeants ever conceited any such mat- Semaine's  
Co.lib.5.f.  
t. That which there was replied, *viz.* Case.  
at the Statute was not forfeited, is here  
be remembred as good matter both  
ainst Statutes and Recognizances; and  
at whether the Recognizance have a De-  
-sance, or a Condition not broken, so  
at the Recognizance is not forfeited. In  
one of these Cases is the Executor hin-  
ered from payment of Debts by Spe-  
alty, nor can he be justified or excused if  
y colour thereof he refuse so to doe: and  
deed else might Creditors be exceeding-  
y defrauded by Recognizances for the  
eace and of good behaviour, &c. and so  
y Statutes for performing Covenants  
ouching the enjoying of Lands, if these  
ould keep off the payment of Debts; and  
et themselves perhaps never be forfei-  
ed, nor the sums become payable,

*Of Debts by Specialty.*

Now come we to Debts due by Specialty, *viz.* Bond or Bill, (of which nature the greatest number of Debts are.) Let us then see what course the Executor must or may hold for satisfaction of these, admitting that the Testator stood not indebted by any Record, or that no forfeiture is of any such Debt, or that there be Goods in the Executor's hands above the Amount of such Debts by Record. This, I say, *dato*, then, according to the Rule, *Proximus quisque sibi*, the Executor may first satisfie himself of such Debts as the Testator by Specialty owed him: for such Debts are not released by the Creditor's taking upon him to be Executor to the Debtor; though, on the other side, if the Creditor make his Debtor Executor, this is a Release of the Debt. Although it be given out or commonly spoken in the general, that an Executor may first pay himself; yet is it to be understood with this caution or condition, *viz.* That the Debt to him be of equal height or dignity with the Debts to others, according to the Rule, *In aequali jure, melior est conditio*.

*i possidentis*: for if his Testator were indebted to other men by any Statute, Judgment or Recognizance, and to him whom maketh Executor onely by Bond or other Specialty; then may he not first pay himself, that is, by paying of himself leave in unpaid whose Debts are of an higher Surety; but if there be sufficient for satisfaction both to them and himself, then is it material which he first paid. Now touching the Debts to other men, the Executor hath power to give preferment in payment to whom he will: so that if the Testator left but 100*l.* being indebted to *A* 100*l.* and to *B* 100*l.* by several Obligations; the Executor hath power to pay his whole Debt, and to leave *A* altogether unpaid any part of his Debt, so as he have not commenced any Suit before payment to *B*. But yet herein this difference is to be taken and observed by Executors, That if the time of payment upon the Bond of *B* were not come at the time of the Testator's death, then may not the Executors, before the money to *B* become payable, pay him, and leave *A* unpaid, whose money was presently due. Yet if *A* forbear to demand or sue for his Debt till the Debt of *B* become also payable; then is

28 H.8. Dy.  
22. Doct. &  
St. ca. 10. p.  
78.

is it at the will of the Executor to pay whether of them he will ; so as the other may lose his whole Debt , if the Good will not suffice to pay both. What if . have onely by word demanded his Debts and not by Suit, before the Debt to *B* be come payable ? whether doth that hinder that the Executor may not now, when the money to *B* is also payable, pay him and leave *A* unpaid ? And hereunto *Germ.* answereth negatively, making the verbal demand to be idle and of no value : yet he addeth, that if *A* have commenced Suit before the Debt to *B* become payable , yet if the Executor can delay the Suit till the Debt of *B* become payable, so that *A* can get no Judgment before that time , and before *B* hath commenced Suit upon his Bond , then make the Executor confess his Action, and so pay his Debt , leaving *A* unpaid. But of this I make some doubt , for that I find in 9. of King *Edw.* 4. some Admittance, that if *A* having a Tally, Patent or other Warrant from the King, for receipt of money of or from a Customer or Receiver, where other had like Warrants before him , but *A* maketh the first Demand ; now must the Officer first pay him,

*Do. & St.*  
*p. 78.*  
*Quære, if*  
*then he may*  
*not plead*  
*this Judge-*  
*ment post*  
*ult. contin.*  
*against A,*  
*as he may*  
*plead it a-*  
*gainst other*  
*Suits after*  
*commenced.*  
*Co. lib. Intr.*  
*148, 269,*  
*149. a.*

him, or else himself shall become Deb-  
to him, if he first pay others whose  
Demands were after made, though they  
Warrants before A. Likewise there  
is as to me seems, some Admittance  
in the same Book, that the very Demand  
made by a Creditor of his Debt from an  
Executor, who hath then *Assets* in his  
hands, doth intitle the Creditor to recov-  
er damages against the Executor out of  
his own goods: which if it so be, then  
even the verbal Demand lay some  
or obligation upon the Executor for  
payment. But hereabout I lay down  
nothing peremptorily. We partly may  
discern by the Premisses how the Execu-  
tor is to guide himself, in the case where  
there be divers Debts by Specialty all due  
and payable at the Testator's death, be-  
fore any Suit commenced for any of  
them: for in that case clearly the first  
verbal Demand gives not any precedence,  
all being due, and so standing in equal  
degree. And this is implied in many  
books, making the commencement of  
the Suit onely that which intitles to pri-  
ority of payment, or at least restrains  
the election of the Executor. Yet, admit  
that one Creditor first doth begin Suit, if  
others

41 E. 3.Fitz.  
Ex. 68.6& 7  
El.Dy.232.  
Vide 21 H.7.  
Kew. 74.

5 Hen. 7. 27.  
So Walmley  
Just. P. 39  
Eliz. in  
Error a. Ser-  
jeants Inne.  
Co. li. Intr.  
286. such a  
Recovery by  
Confession  
is pleaded  
against a-  
nother, and  
admitted  
good, & f.  
148, 149.  
Do. & St. p.  
78. b.

others also after sue before he be pa-  
or have Judgment ; now cannot the E-  
cutor pay him first who first commende  
Suit , but he who first hath Judgmet  
must first be satisfied. And the Exe-  
tor may herein yield help to one befor  
the other, *viz.* by Essoigns, Emparla-  
ces or dilatory Pleas to the one, and  
quick Confession to the other's Action  
for he is not bound against his will  
stand out in Suit, and expend Costs, wh  
the Debt is clear : nor is this Covin,  
lawfull Discretion, which Conscience w  
also approve , some good considerati  
inducing. Nay , after Suit commence,  
yet untill the Executor haye notice ther  
of , he may pay any other Creditor , al  
then plead that he hath fully administr  
before notice. Nor is the Sheriff's r-  
turn of Summons or Distress sufficiet  
cause of notice ; for the Summons mig  
perhaps be upon his Land : but if it we  
to his Person , it is notice sufficient ; al  
then, to save himself , he must say, th  
he was not summoned till such a day, b  
fore which he had fully administr'd. Y  
doubtless the Executor may be arrest  
at the Creditor's Suit in some sort, wh  
yet shall be no sufficient notice of th  
Del.

ebt. As for the purpose, if he be sued by  
titat out of the *King's Bench*, this, sup-  
sing a *Trespass*, gives no notice of a  
ebt, so also of a *Sub-pœna* out of the *Ex-  
equer*; but the Original returnable in the  
mmon *Pleas* expresseth the Debt, and  
in some sort doth the Process there-  
on. And there it seems by some Books,  
it if it be laid in the same County  
ere the Executor dwells, he must take  
tice of it at his own peril. But this I  
ke not to be Law, nor is there any great  
inion that way: and although, to make  
more clear, the Executor in King *Hen.*  
fourth his time, estranging himself  
om notice of the Suit before payment  
others, did alledge, that the Action  
as laid in a forein County; that is no  
eat proof, that if his abode had been  
the County where the Action was  
ought he must have taken notice; but  
us it was clearer, and a little surplusage  
irts not.

So also was  
it said Tr.  
29 Eliz.

Now between a Debt by Obligation and  
Debt for Rent or Damages upon a Co-  
ntract broken, I conceive no difference,  
or any priority or precedency; but it is at  
the Executor's discretion to pay first which  
he will, as if all were by Bond. So also

of Rents behind and unpaid, as I conceive but touching them, principally intend Rents upon Leases for years, divers considerations are to be had, and some Distinctions to be made. As first, between Rent behind at the time of the Testator's death, of which that before said is to be understood, and that which groweth behind after, next between Suit for the Recovery by Action of Debt, and Distress and Execution. As to the first difference, if the Rent grew due since the Testator's death, then is it not accounted in Law the Testator's Debt; for onely so much is in Law accounted *Assets* to the Executor, as the profits of the Lease amounted to over and above the Rent; so as for that Rent so behind the Executor himself stands Debtor as hath been resolved, and therefore he sueable in the *Debet* and *Detinet*: whereas for Rent behind in the Testator's life, and another the Debts of the Testator, he must be sued in the *Detinet* onely. Hence it must follow, as it seems, that an Executor sue for Debt upon Bond or Bill cannot (except in some special Cases) plead a payment or recovery of Rent grown due since his Testator's death; though of Rent behind at the time of his death it be otherwise. And

ye

here again another difference or distinction is to be taken, *viz.* where the fits of the Lease exceed the Rent, and where the Rent is greater than the yearly value of the Profits; for even there, as elsewhere is shewed, the Executor, if he has assets, is tied to the holding of the Lease, payment of the Rent, and consequently doth so much of that Rent as exceeds yearly Profit stand in equal degree the Testator's Debt, with other Debts by Specialty. And yet again to re-consider this point, what if the Debts of the Testator by Specialty payable presently at his death, before the time that any Rent can grow upon this Lease, shall amount to the value of the Testator's Goods; may not the Executor, though he do not pay the Debts before the Rent-day, (for that would make the Case clear) wave them? for if he may, then haply if he do not so, but shall by payment of any of the Rent want Goods to pay any part of the Debts by Specialty, it may lie upon himself and his own Goods, as happening by his own default. But on the other side it may be said, that he could not wave it so long as he had *Assets*, because thereby he would be equally liable to pay that Debt, being

ing once due, as the other Debts by Specialty. On the other side it may be said that though the Debts for Rent and upon Bond shall be admitted to be in nature equal; yet the Case being put of Rent due at the time of the Testator's death, was not then a Debt nor Duty, whereupon Bond makes a present Debt and Duty though not presently payable, the day of payment being not yet come; so as this latter is discharged by a Release of Debts and Duties, and so is not the former. So to let that Point unresolved, let us next see whether in some case, though the Rent exceed not the yearly value of the Land, yet even that payable after the death of the Testator may not stand in most part, if it be wholly, upon the Testator's score, as a Debt, as well as if it had been payable before his death. *Posito* then that the whole or half year's Rent is payable at the *Anunciation* of our Lady, and that the Testator dieth two or three days or so like short time before that Feast; now certainly should the Law be unreasonable, it should lay this Debt upon the Executor's shoulders, in respect of those few Winter days profits which he took. But surely since the taking of the Profits induces

the Law to lay the Rent upon the Executor as his own Debt; therefore, as where the Executor had the Profits for the whole year or half year, except some few days incurred in the Testator's life-time, those few days will be unregarded, according to the Rule, *De minimis non curat Lex*, and the whole Rent shall lie upon the Executor as his own Debt; so on the contrary part, when the whole year or half year's profit, except some few days, incurred after the Testator's death, the Rent, becoming payable so instantly after the Testator's death, must in reason lie wholly upon the Testator's Estate, as to me it seems. What if to this I add, that the Testator's cattle wherewith the ground was stocked do depasture and devour the Profits till the time after the Testator's death, till the day of payment of the Rents? Nay, if the Rent were payable at *Mich.* and the *Innunc.* and the Testator dies a few days after *Mich.* the Rent being of or near the value of the Land, it will then be hard that the Exec. shall for this Winter-profit pay the Rent out of his own purse, especially if the whole year's Rent be payable but that one day, as in some Cases it is; or if the whole year's Profits were taken in

the Summer, as in case of a Lease of Tithe. It is so also of Meadow-grounds, usually drowned in the Winter. So if the Lease be then to end, not having a Summer half-year to succeed and make amends for the Winter: or if the Winter half-year be the latter half, the Lease beginning at *Lady-day*, so that there is but one Summer for each Winter following, and not any for the Winter passed. Of like consideration with these is the case of Lease of Woods for a Rent, which being fellable but once in eight or nine years now if, the Lessee having made the Sale and Felling before his death, the Executor should cast the Rent upon the Executrix's own Estate for the time future, it should lay loss upon him; which is against Reason, and contrary to the nature and disposition in the Law, even in this particular as appears by this, that she enables the Executor to pay himself before any Debts of equal nature, so as she more tends to an Executor's indemnity than any other Creditor's. Therefore I think that with and upon the differences above shewn, even Rent grown due after the Testator's death may in some cases be the Testator's Debt, payable equally with Debts.

BOND

Ind. But here I conceive, that if the Executor were in such case of destitution of Assets as might justify his waving of a Case over-rented, he then may wave the Tenant's residue; because for the future the Profits will come short of answering the Rent, though at the first, and so in the time, the Profits did exceed the Rent. And for want of waving where he might let his Rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good Administration; for *Ignorantia Juris non excusat*. This is pertinent to our present Consideration, which Debt may with safety be paid, leaving another unpaid: and the hazard of Executors by ignorance of the Law hath been a principal motive to writing these Discourses in English. thereto we have onely considered, as I think, of Rents as they be recoverable by Action of Debt. Now let us see if there may not be somewhat different considerations touching distraining for Rent, and coming to recover it by Avowry. Put then the case that an Executor hath by administration in payment of Debts by bond, and after the Lessor or Reversioner meth and distractineth for Arrearages of

Rent due in the Testator's life; can the Executor in bar of the Avowry plead Fully administered, as he might have done if Action of Debt had been brought for the Arrerages? Doubtless, I think no; nothing shall hinder the levying of the Rent upon the Land, so long as it is enjoyed under the title of the Lease, except the Land come to the King, upon whose possession no Distress can be taken. I think therefore that the Executor, who pay'd out his own purse to the value of this Lease (for so I intend the Case, and else could he not have fully administered, as in this Case was put) should have abated in the price and valuation of the Lease as well as the Arrerages of Rent, as the Rent futurly payable, both being equally leviable upon the Land; and if he so have done, he no loser by payment of this Arrerage: but, trusting to the power of an Executor as to the Plea of Fully administered, he did not so, but disbursed, in respect of the Lease, to the full value without such Abatement, he must bear the loss of his own ignorance. He might also another way have helped himself, viz. by payment of that Arrerage, leaving other Debts & Specialty unpay'd. And what if Suits were

resently commenced upon the Testator's  
Death, before he could make payment of  
the Rent behind ? whether might the Exe-  
cutor then plead this Debt for Rent, as  
he might a Debt by Judgment or Statute ?  
Surely methinks it's probable that he  
ought, because it is a Debt from which he  
cannot be freed by payment of the other  
debts sued for by Specialty. If the Rever-  
sioner would also commence Suit before  
Judgment had for the Creditor by Spe-  
cialty, then might the Executor help  
himself by confessing his Action first :  
But this perhaps the Reversioner would  
not conceive safe for him, since that way  
the others might get Judgment before  
him, and so he might lose both his Suit  
and his Debt ; whereas holding himself to  
the course of Distress, the Lease continu-  
ing, he hath Land at the stake for his Debt.  
What if he distrain and avow ? may not  
now the Executor pay him, or at least  
confess his Action or Avowry, so as he  
first having Judgment may first be sa-  
tisfied ? Surely after Suit commenced I  
see not how the Creditors by Bond can so  
be prevented, at least without Judgment  
had for the Rent, yea though such a Judg-  
ment be had : yet because the Judgment in  
that case is not, that he shall recover  
the

the summe due for Rent, but onely th  
e shall have a return to the Pound  
the Cattel distrained for the Rent, it  
questionable whether the payment ther  
upon of the Rent shall prevent the Jud  
gments after had in the Suits upon Bond  
But I think it shall; because although  
be not an express Recovery of the Ren  
yet it is such a Judgment compulsory fo  
the same as makes the payment inev  
itable and of necessity. And where be  
fore we have made the question onely be  
tween the said Rent-debt and the Det  
by Obligation; let us now put the Cal  
between the Rent-debt and the Debt b  
Statute or Judgment. If then the Lessor  
after death of the Lessee, constrain for th  
Rent behind part of the Testator's Cattel  
and after there come a Writ of Executio  
upon a Judgment or Statute of the Testa  
tor's; whether shall these Beasts in th  
Pound for Rent be delivered in Executio  
or not, admitting that without then

See 13 R. 2.  
Bro. Pledges  
31. Attain  
der of the  
party di  
strain'd tha  
not take a  
way the Di  
fress. vi. Dy.  
there be not Goods sufficient for satisfa  
ction of the Judgment or Statute? And  
surely I think they cannot be delivered  
in Execution. First, for that they are in  
the custody of the Law, as in *Stringfel  
lew's Case*, though there the King's Pre  
rogative

negative overtopped that point. Yea so I think, though they be replevied, for that they are to be returned to the bond, if Judgment pass for the Avowat, to which purpose Security is given; as they are but in the case of a Prisoner bailed, who still is in some sort in custody. Secondly, for that this Rent incident to and descendable with the Reversion breeds a Debt of a real nature, and so of more dignity and worth then debts personal. Thirdly, for that the land let (as in a sort Debtor) stands chargeable with this Distress from the very time of making the Lease, as either by Contract real of *quid pro quo*, or rather by an operation of Law or Legal Constitution, or ancient Custome of the realm, without any Contract of persons. Lastly, for that the Lessor doth not distrain the Cattel therefore, or in that respect, for that they are or were the Goods of the Testator, but for that he found them levant and couchant upon the Land which must afford his Rent, a Distress for it if behind: so as if they had been any Under-tenant's or stranger's Cattel, they might have been distrained. Some may perhaps object this

this reason why these impounded Cat should be delivered in Execution, *viz.* that where otherwise the Creditor by Substitute or Judgment should lose all or part of his Debt, yet by this Relief done to him shall not the Lessor lose his Rent, for then he may at any time after distrain a Goods or Cattel found upon the ground at any time during the continuance of the Lease. But here, besides the point of delay and stay for this Rent, which many is the sole means of maintaining their Households and Families, this farther is considerable, that perhaps the Lease may be near expiring, perhaps so highly racked and rented even to or above the value, as that the Executor having his Testator's stock taken from it and himself by Execution, will not stock it any more, and so the Land lying fresh, if the Lessor shall lose the benefit of his former Distress, he shall be perhaps without remedy for his Arrearages of Rent. And if the case were of a Distress for Rent behind after the Testator's death, I conceive, though not so strongly, for most of the reasons above said, that the Law would be all one as in the other Case: for though in this Case respect shall not be had to the Executor

is upon whose Goods the Law casts this Debt, though not the other ; yet here the point of loss must fall either upon the Lessor losing his Distress, or upon the other Creditor by Specialty or Record losing wholly or in part his Debt. And in respect of this local tie upon this Land for payment of the Rent, whereto even the Fealty of the Lessee and Tenure of the Land bindeth him, I think no act that the Lessee can doe by entring into Bonds or Statutes, or having Judgment against him, can hinder the Lessor or Reversioner from taking his remedy upon this leased Land for the Rent therefore due ; but rather any other Creditor shall be a loser in his debt. Doubtless, if in bar to the Avow for this Rent due either before or since the Testator's death the Executor will plead, that the Testator was indebted 1000*l.* by Statute, Recognizance, or Judgment, which is more then all his Goods amounted unto ; it will be no good plea, but may be demurred upon. What he plead so much Debt of Record to the Crown ? Surely I doubt whether this plea will be allowed in any other Court then in the Exchequer : yet if these Arrearages of Rent shall be levied upon the

*Vide Bro.  
Pledg. 31.*

the Land, so as either the Executor must pay it, or lose the Cattel distrained by a Return irreplevisable, and then shall not have sufficient to satisfie the Debt to the Crown; I see not how he shall well escape, when pursued in the *Exchequer* to make up this Crown-debt out of his own purse, which is hard. For this we may pitch upon as a Maxim and Principle, that an Executor, where no default is in him, shall not be bound to pay more for his Testator than his Goods amount unto. Again, it is a rule that where nothing is to be had, viz. justly to be had, the King loseth his right and our Books tell us, the King's Prerogative must not doe wrong. *Potestas est  
jus juris est, non injuriæ : nam potest  
injuriæ non est Dei, sed Diaboli.* On the other side, it may be said, that if Land leased come to the King by Grant, Outlawry, or otherwise, the Rent reserved cannot be distrained for; and therefore it is not very unreasonable nor incongruent that the King's interest for his Debt should make the Distress of a Subject stand by and give place. This therefore among other of the Premisses do I leave as a *Quære*: nor is it altogether unprofitable

*So Bradon.*

ble either for an Executor or Creditor  
know what ways and passages , what  
es and contingents be doubtfull and  
ardous. And if in these unbeatent paths,  
re our Books and Relations have held  
forth no light express or particular, I  
e erred in mis-resolving, or missing to  
elve ; I hope I shall without difficulty  
in pardon.

Now let us consider of Assumptions or  
mises made by the Testator upon  
d consideration ; the performance  
reof, or making recompence and sa-  
ction for not performing , doth lie  
n an Executor , as before is shewed.  
se therefore are to come behind, and  
place unto all the former ; so as an  
Executor this way or for these sued may  
ld Debts by Specialty, Rent, &c. a-  
ounting to the whole Goods. And yet  
se Debts by Contract or Assumption  
xress are to be satisfied before Legacies  
eo be had. First, because by the Com-  
n Law of the Land those are recovera-  
l and so are not Legacies. Next, because,  
s our Books speak, it concerns the Soul  
he Testator to have *as alienum*, all  
ties and Debts to other men , satisfied  
ore the Debtor's voluntary Gifts or Be-  
quests.

Co.lib.9.fo.  
88.b. Doct.  
& Stu.lib.

2.cip.10 &

II.

quests. Also these Debts by Assumption or simple Contract are to be satisfied before the reasonable part of the Wife Children, to which by Custome in some Counties they are intitled. See 21 Ed. 21. and 2 Ed. 4. 13. and 2 Hen. 6. 16. I note that in such an Action upon the C it is not of necessity to lay or set forth the Declaration that the Defendant has *Assets* to pay all Debts by Specialty, ; this also : but if there want , the Defendant must alledge that in his excuse , else it shall be presumed that he hath *Assets*. So also in an Action upon a C grounded upon the Executor's own Assumption to pay his Testator's Debt : a yet, as the L. Coke conceives, and upon good reason, as to me it seems, if the Executor so promising had not *Assets* sufficient in his hands to pay this Debt promised, he pleading *Non assumpit*, may give that in evidence ; for then the consideration faileth ; as also if there were such Debt due , since the Plaintiff could not have recovered if he had sued, and his forbearance to sue was no valuable consideration.

*Co. l. 9. fo.  
90. b. Pin-  
chon's Case ;  
and fo. 94.  
Dane's Case.*

## CHAP. XIII.

*Of Devastation or Wasting.*

Hat which St. Paul of Dispensers Spiritual (who are as it were the Executors of the last Will and Testament of Saviour Christ) doth say or enjoyn, that they must be found faithfull ; same is required of these less or inferior Dispensers, the Executors of mens Wills : and hereof they are to be redfull, not onely in respect of escaping damage to their own Estates, but more specially in respect of an Oath which dispensers of our Books mention to be taken by executors. And in one of the Books of Statutes of Cases in the twentieth year of his time, there is an expression of three things whereto the office of an Executor tieth him. 1. To doe truly, and thereto are they sworn, saith this Book.

To be diligent, *viz.* with sedulity to tend the discharge of the trust. 3. To be lawfully ; nor well can this latter without knowledge what is lawfull

Q

or

or required by the Law. Now what formerly said of the right Method and order of payment of Debts, discovereth much part how and by what ways an Executor may waste and mis-spend his Testator's Goods, and consequently incur Devastation, and so make his own Goods liable. But of that more fully and particularly by it self. And herein we will consider of these parts.

1. What shall be said to be a Wasting or Devasting, and how many ways there may be done.
2. Who shall by this Act be charged to yield recompence.
3. Who shall take the Benefit or advantage of it.
4. How far or in what measure the Advantage shall be taken.
5. What way or by what means shall be had.

As to the first: this Wasting is done divers ways. 1. By the Executor having plain, palpable and direct giving, selling, spending or consuming the Testator's Goods after his own will, leaving Debts unpay'd. 2. By paying what is not to be pay'd; which yet is to be understood where there are Debts payable, and unpay'd.

y'd. 3. By the way formerly discours'd of, *viz.* the not observing the right method and order of payment. 4. By assisting to a Legatee's having a thing bequeathed, Debts being unpay'd. 5. By selling Goods of the Testator's at an under-value; for (be the Appraisement what it will, and let him sell for what he will) he must stand charged to the best and utmost value towards the Creditors. Yet if upon Judgment against the Testator or the Executor the Sheriff sell some of the Testator's Goods at an under-value, this is — Vastation of the Executor, for this difference *Holy chief Baron* makes. But since Executor may haply prevent this act of the Sheriff, by paying the due sum upon sale of the Testator's Goods at the best value or otherwise, he is to be blamed to have it to the Conscience of the Sheriff or Under-Sheriff rather. 6. And lastly, this may be done to the Executor's smart by undue, *viz.* not legal, discharging of any debt or Duty pertaining to the Testator, and that divers ways requiring heedfulness. As if an Executor upon a Bond of two hundred pounds forfeited for payment of 100/. accept the Principal, or perhaps also some Use, Costs, or Damage,

13 E. 3.  
Fitz. 91.

Yet on the  
other side, if  
an Executor  
by payment  
of a 100 l.  
get in a for-  
feited Bond  
of 200 l. it  
shall be an  
Administ.  
but of 110 l.  
27 H.8.6. P.  
Fitz. inst.

and give a Release or Acquittal of the whole forfeited Bond, or of all Action or upon Record acknowledge Satisfaction upon Judgment had ; this is a Wasting so much as the penal sum is more then received, and so far his own Goods still liable to Creditors not satisfied : and doubtless is it, if he do but give up the Bond, having no Judgment upon it though he neither make Release, nor acknowledge Satisfaction. But his verbal Agreement to require or sue for no more or his giving a Note of receipt for so much as he hath received, or delivering of the Bond into a friend's hands or into a Court of Equity in way of Security to the Debtor, that he shall not be sued for more, no Devastation, since still the rest in Law remains due and suable. So this sets no more upon the Executor's score then he received. But let him take heed of Releasing, except he be sure there be no other Debts demandable. Nor onely there danger in Releasing of Debts, but Trespasses or other causes of Action also. As if one take away Goods from the Testator, or from his Executor ; if the Executor make him a Release, this is a Devastation, and makes his own Goods liable to

whole value of the Goods released : appears by *Russel's Case*, where the release of an Infant, Executor to one who had taken and committed to his use Jewels and Goods of the Testator, being pleaded, the Release was therefore held void respect of Nonage ; for that if it should have stood good, it had amounted to a *Devastavit*, and made the Executor's own goods liable ; which, his Infancy considered, had been hard. Another way of discharging dangerous to Executors is, submitting matters of Debt or Duty, or such Goods taken away , to Arbitrement. For if by the award of the Arbitrators the Debtors or Wrong-doers be discharged or acquitted without making full compence, the rest of the value will ( as other Creditors ) sit upon the Executor's parts, because it was their voluntary act to submit it to Arbitrators. Thus may Executors fall under prejudice, not only by wilfull Wasting or unfaithfull miscarriage, ( wherein they are not to be pitied ) but through incogitancy and unskilfulness so. Nay, I may say truly, that it is very hard for Executors in some cases to walk safely: for besides that, to find out all Judgments and Recognizances by or against

their Testators is of some difficulty more  
then for Statutes, whereof by search in a  
Office descry may be had ; yet with the  
difference, that Statutes-Merchant and  
Statutes-Staple may be and stand effectu-  
against Executors, though not inrolled  
albeit against Purchasers of the Conuso-  
Land they be not of force, if neglect  
of Inrollment within three months. But  
where Statutes or Recognizances lie for  
performance of Covenants upon Sale  
Lease of Lands, Marriage, Agreement  
or otherwise ; how hard is it for Execu-  
tors to know whether any Covenant be  
broken or not ? how hard to be sure they  
find out all Bonds, Bills, Covenants and  
Articles in writing, made and kept by o-  
thers, whereby any money is due and pay-  
able before Debts by Contract or Legacie  
as also all Promises or Debts by Contract  
payable before Legacies ? For the Law  
hath prescribed no time for their claim  
and demand : and whether some such thin-  
or mean of publication were not fit to be  
enacted, let the judicious consider. To  
attain to this knowledge of the Testator's  
Debts, I remember that it is by the Lord  
Brook reported, that in King Hen. the 8<sup>th</sup>  
his time Sir Edmund Knightly, being Exe-  
cutor

ctor to Sir *William Spencer*, made Pro-  
clamation in certain Market-Towns, that  
the Creditors should come by a certain  
day, and claim and prove their Debts ; but  
for this was committed to the Fleet,  
and fined. For that none may make Pro-  
clamation, saith the Book, without War-  
rant or Authority from the King , except  
Mayors and such like Governours of  
Towns, who by Priviledge or Custom may  
doe. But the dangers are onely where  
there is not sufficient of the Testator's  
goods and Chattels to satisfie both  
Debts and Legacies. For where there is  
not, the Executor is not in any such hazard  
aforesaid. This descry of Danger may  
need Caution ; and *Qui timent carent,*  
*vitant.*

As to the second, we shall have in con-  
sideration two sorts of persons, *videlicet*,  
his Executors, there being many times  
vers Executors, and the Waste or Deva-  
tion done but by one ; 2. the Execu-  
tor's own Heirs, Executors and Admini-  
strators, *viz.* whether, he dying, this act  
shall fix upon them like charge and bur-  
den for satisfaction, as upon himself should  
have lien in case he had lived.

Touching his Companions, though all

Lib. Instrat.  
 fol. 327.  
 Kelw. rep.  
 fol. 23.  
 So 12 H. 6.  
 38. 2.  
 4 El. Dy. 2.  
 10. 2. the  
 Writ so is-  
 sued against  
 the Waster  
 only.  
 F. 4 H. 8.  
 rot. 303.  
 Tr. 34 Eliz.  
 Pas. 36 Eliz.

together make but one Executor, yet  
 mis-doing of one shall not charge the r-  
 nor make their Goods liable to rec-  
 pence; as both appears by the Book  
*Entries*, and was also held in the time  
*Henry the seventh, Ann. 12.* of his Rei-  
 Yea of the same opinion were the Jus-  
 twice in the late Queen's time, viz. in  
 in a Case between *Walter and Sutton*,  
 the *Common Pleas*, and shortly after  
 the *King's Bench*, in a Case betwe-  
*Hankeford and Metford*; though th-  
 two Cases be not reported in Print. A-  
 surely this stands with rules of Reason  
 Justice, that each should bear his o-  
 burthen: If it were otherwise, ma-  
 would decline and abandon Executo-  
 ships, as very dangerous to the most h-  
 nest and faithfull, in case they were subje-  
 to racking by the miscarriage of the  
 Collegues.

As for the Executors or Administrato-  
 of the wasting Executor dying before  
 have born the burthen of this mis-doin-  
 I have found contrary opinions, eyen  
 the late Queen's time. For first, in th-  
*Exchequer* it was conceived to be as  
 Trespass dying with the person, as comin-  
 within the Rule, *Actio personalis moritu-*
cui

persona. But in the said case of *Walter Sutton* the Court of Common Pleas <sup>Mich. 31 & 32 Eliz.</sup> of contrary opinion, *viz.* that this was not escaped by the death of this Miser, but the Law would pursue his Executors or Administrators, and lay upon their backs the burthen of Recompence or Satisfaction; for that the Testator or Intestate being this wrong had made himself to be Debtor in the first Testator's stead, and therefore they who represent his person with his Goods make amends and apply. And this later opinion was something in time after the former. Also between these two times was there an opinion in the said Court of Common Pleas agreeing in part with this later: For ere a Judgment being had against an Executor, and the Sheriff upon the *Fieri facias* returning that there were no Goods of the Testator in the Executor's hands, and then this Executor dying, a *Scire facias* upon a suggestion of Devastation by the said Executor deceased was awarded against his Executor, and that upon good debate, and shew of a Precedent left, and reported by M. *Jennour* in King Hen. 8. his time. And it was then said to have been clear, that if a Devastation

<sup>Mich. 32 & 33 Eliz.</sup>

on

on had been returned in the life-time  
the said wastfull Executor , his Execu-  
then should have been charged. All  
doubt was , for that here that was  
done in his life-time ; yet at last affir-  
tively (as above is shewed ) the Reso-  
tion was.

Touching the third Point , *viz.*  
whom the advantage of Wasting sh  
accrue , or who by reason thereof sh  
charge this wasting Executor : Put  
the case the Testator stood indebted  
*A* by Statute , and to *B* , *C* and *D* by Sp-  
cialty not of Record , as Bond , Bill , &  
and the Executor having no more in *A*  
*sets* then onely an hundred pound , and  
this all being due to *D* , he payeth him  
the whole hundred pound , not having a  
ny thing left to satisfie any of the rest  
the Creditors : hereby wrong is done to  
none but *A* , who was a Creditor by Sta-  
tute , and therefore he onely shall make  
this Executor to pay the like summe out  
of his own Goods , since as to him onely  
this is a Devastation , or that it was at his  
election to pay off the other Creditors  
which he would , no Suit being commen-  
ced by any of them , consequently no  
wrong was done to *B* nor *C* . And if no  
such

Debt had been by Statute, but all  
been Creditors by Specialty, and *A*  
had commenced Suit, and that  
to the Executor; now if after he  
all to *D*, He stands onely as to *A* li-  
in his own Goods, and not to *B* nor  
But if the Executor had onely paid a  
acy or Debt by Contract, leaving no-  
g for satisfaction of the Debts by Spe-  
ty, then had he stood equally liable  
each of the other Creditors. *Capiat qui*  
*erit potest*, viz. He who first couldre co-  
, or by the voluntary act of the Exe-  
tor could obtain payment , must be  
ferred, if the summe would reach  
farther. For it shall by this mispay-  
nt, or misconversion , stand with the  
Executor as if he had not payed it nor  
departed from it at all upon the matter :  
ad therefore I doubt not but it is free for  
him to give the advantage of this his er-  
rur to which Creditor by Specialty he will,  
as he shall stand free from all the rest,  
surplusage remaining, nor any Creditor  
Record being. For if there be any Debt  
upon Record, the Executor sued by a Cre-  
ditor upon Bond may , notwithstanding  
is his Wasting, plead in bar of this Suit,  
that there is such a Record of a Debt not sa-  
tisfied,

If upon Fully  
administred  
pledged to  
one, *vel ali-*  
*ter*, he have  
the advan-  
tage of this  
Vastation,  
taking up  
the whole  
Sum wasted,  
*Quæ* how  
the Execu-  
tor shall re-  
lieve himself  
against ano-  
ther.,

tisfied, and that he hath no more t  
that Debt amounts unto, and so ad  
so much still in his hands as he hath n  
administred, though in kind it be no  
his hands, but mis-spent, or unduly pay  
as aforesaid. And what is before shew  
of the Statutes precedency before Bon  
in taking the advantage against an Exec  
tor for devastating or wasting, the same is  
be understood of precedency of Judg  
ments before Statutes, and of Debts to  
King before Judgments, &c.

As touching the fourth Point, *viz.* Ho  
far the Executor thus wasting shall inc  
dammage or make his own Goods liabl  
Doubtlesse; no farther then the value e  
the Testator's Goods wasted or mis-a  
ministred. Therefore if one have a  
vantage thereof to the full summe, i  
other after shall; for he is no farther  
Trespasser or Wrong-doer, nor is the Te  
stator's Estate any farther or deepli  
damnified. And as Dammages for Trespa  
are to be proportioned to the value of th  
Wrong done and loss sustained; so al  
so in this case the Executor by his mis  
doing doth not draw upon himself hi  
Testator's whole Debts, but so much one:  
as the Goods amounted to which he die  
mis.

to administer, and which should have  
done to the payment of the Testator's  
Debt, if he had not so misguided himself  
in the office of Executorship; which debt  
he must repair or make good. And  
this proportion seems to me proved by  
Case in K. Edw. 3. where the value or 41 E.3.31.  
entity is found, especially of the Goods  
administered wrongfully, though there by a  
negligent person: and in *Sutton's Case* it  
is expressly held; that each Executor  
shall answer for so much as he wasted.

Now for the fifth and last Point, *viz.*  
how and in what manner Relief shall be  
had upon this point of Wasting, for him to  
whom it pertains: First, this is to be ob-  
served, That in case where the Verdict  
doth directly against the Plaintiff, no  
Devastation can come in question, for  
that no Judgment being for the Plaintiff,  
no Writ of Execution can issue; and there-  
fore, if upon the issue of Fully admini-  
stered it shall appear that there hath been  
Devastation, which causeth *Assets* to fail,  
then must the Jury find that the Defen-  
dant hath *Assets*, and not find a Devasta-  
tion, as was resolved in the King's Bench  
in the late Queen's time between *Hanke-  
rd and Metford*: for there the Jury find-  
ing

ing a Devastation, *viz.* a Surrender o  
Lease for years left by the Testator,  
was held void and nugatory, and was n  
regarded by the Court, which said th  
must come in by the Sheriff's Return, *vi*  
upon the *Fieri facias*. Thus *Assets* bei  
found in the Executor's hands, Judgme  
is given for the Plaintiff to recover t  
Debt, and to have it levied of these *Asset*  
nor is this finding of them by a Jury  
gainst truth, though they be wasted, a  
so not to be had in kind; for the Exec  
tor hath them in right, since he hath no  
rightfully parted from them; according  
the Rule, *Pro possessore habetur qui dolo (o  
injuriam) desit possidere*. As in the Ca  
first put this Wasting cannot come  
question for want of a Judgment for th  
Plaintiff; so also where the Judgmer  
it self extendeth to the Executor's ow  
Goods by reason of some false Plea, where  
of we shall after consider: for since th  
the consequence and effect of a Vastatio  
is but to make the Executor's own prope  
Goods liable to the Debt of the Creditor  
this is altogether needless where th  
Judgment it self hath laid hold on hi  
Goods. But now in case where the Judg  
ment extends onely to the Testator'  
Good

Gods in the Executor's hands, let us find  
t way to relieve the Creditor, in case the  
Testator's Goods be wasted by mis-admi-  
niring or otherwise; for hereabout the  
rent way hath often been misled, and a-  
gn easily may be. In the latter end of the  
Qu. time, this course was taken, *viz.*  
The Sheriff returning generally, that the  
Executor had no Goods, a Surmise was en-  
t'd, that the Executor had converted to  
h own use the Testator's Goods, where-  
upon a Writ was awarded to the Sheriff 43 El. Pet.  
to enquire thereof by Jury or Enquest, *tifer's Case.*  
which he did, and returned, that it was Co. lib. 5.  
found that the Executor had wasted the  
Goods; and thereupon a *Scire facias* was  
awarded against the Executor, to shew  
use why Execution should not be of his  
own Goods; and upon two *Nihil's* return-  
Execution was so awarded: but a Writ  
Error was hereupon brought. And  
though it were said, for defence of that  
course, that it was usual in the *Common  
leas*, and more favourable then the o-  
ther course, where the Sheriff onely re-  
rneth the Wasting, or is sole Judge  
thereof, whereas here it was found by  
Inquest of Jurors, and thereupon a  
*Scire facias* awarded; yet did the Court  
resolve

resolve the contrary, and reverse this Execution as erroneous : for it was said, upon the Sheriff's return of *Nulla bona*, viz. that there were no Goods of the Testator to be found, the Plaintiff should have a special Wait of *Fieri facias*, binding the Sheriff to levy the sum recovered either of the Goods of the Testator, or if it could appear that the Executor had wasted the Testator's, then levy it of his own Goods: And this was as was said, the Executor hath good ready by Action against the Sheriff, if without just cause he levy it of his Goods but the other way, viz. when Inquest is thereupon taken, the remedy fails since neither the Sheriff doing according to the Inquest can be punished, nor Jurors finding falsely are subject to a Attaint, it being no Verdict upon Issue joyned, but an Inquest of Office, which excludeth also all challenge of Jurors: And whereas that Book mentions the Sheriff's subjection to Action onely in case of his misfeasance or doing wrong; conceive that he is likewise suable for omission or non-feasance in this case, viz. for not levying the Debt upon the Executor's own Goods, where proof is made.

See *Paston*,  
11 H.8.16.  
36. upon

*A hath wasted, a Fieri facias may issue against his Goods onely, if so, &c.*

So lib. Int. fol. 11.

his Wasting. And where the Book  
mentions this *Fieri facias* to be in this  
anner upon the Sheriff's return in a *Sci-*  
*facias*, doubtless the Book therein is  
is-printed, and should be a *Fieri facias*;  
in a *Sci. fac.* the Sheriff can return no-  
ing but that he hath warned the party,  
that he hath nothing whereby he may  
warned. This then is the course there-  
escribed, that first a general *Fieri fac.*  
out, and that thereupon the Sheriff  
turn generally, that the Defendant hath  
Goods of the Testator's, and that there-  
on the said special Writ is to issue. Yet  
the beginning of the late Queen's time,  
the Verdict passing for the Plaintiff upon  
the Issue of Fully administered, the Sheriff  
is not permitted to make such a general  
return of no Goods to be found of the Te-  
tator's, but was inforced by the Court  
on good advisement either to levie  
the Debt, or to return a *Devastavit*: and  
it was done at last by the Sheriffs of  
London; much against their mindes; and  
thereupon went out a Writ to levie the  
Debt of the Executor's own Goods, first in  
London, and after into Devonshire, upon  
a *Testatum* thit the Executor had  
Goods there. And it was there said, that

<sup>2 E.L.D. 185.</sup>  
Woodw.  
and Chiche-  
ster's Case.

if no Goods could be there found, th  
the Plaintiff might have a *Capias* to ta  
the Executor's Body in Execution, or  
*Elegit* for the moyety of his Lands. B  
certainly I cannot finde ( except with  
difference ) how this course of inforci  
the Sheriff to doe one of these two can  
just ; as neither could Justice *Fultho*  
in the time of K. *Henry* the sixth appro  
it. For a Jury of one County may fin  
*Assets* in another County, as was reso  
ved in the time of K. *Henry* the 8th, whi  
yet was understood of Goods moveab  
and not of Lands. This then thus being,  
a Jury of *Kent* find *Assets* which be  
*London* or *Essex*, how can the Sheriff  
*Kent*, where the Action was laid, lev  
the Debt recovered by or out of the  
Goods ? or, since he cannot, why shou  
he be compelled to make a false Retu  
of a Wasting, when the Goods rema  
unspent and unwasted in another Cou  
ty ? Why rather should he not be su  
fered to return according to truth, th  
there is nothing within his County  
Bayliwick whereof the Debt may b  
levied, since even his Oath tieth him  
make a true Return ? Nor is this contrar  
to the Verdict, finding *Assets* generally

11 H. 6. f.  
28. 28 H. 8.  
Dy. 3. Yea  
Co. lib. 6. f.  
47, 48. Af  
fests in Ire  
lan', or  
elsewhere  
beyond the  
Sea, may be  
found by the  
Jury where  
the Action is  
laid.

For the Pl.  
may, if he  
will, suggest  
the being of  
*Assets* in a  
forein  
County, and  
this is usual  
ly done.

See *lib. intr.*  
11. a. Action  
upon the  
Case for a  
false Return  
of Devastat  
e *mir. facr.*  
*fui debitur,*  
28 H. 8.

and this so returned upon a *Testatum*, the process may be directed into the right County. But in the said Case it was replied to the Plea of Fully administered, that there were *Assets* in *Essex*, the Action being laid in *Middlesex*; and yet, as it seems by the Book, the Trial was to be by Jury of *Middlesex*, which, saith the Book, may find the *Assets* in *Essex*: but there the Plea was demurred upon, and held a good Plea; which proves, that although the transitoriness of the *Assets* makes them subject to the notice of a forein Jury; yet it not like an act transitory, and not local, or that must be pleaded to be done in the place where the Action is laid, though in truth not so. But had Issue been joined upon the point, methinks it should be tried in *Essex*, where the *Assets* be laid; the rather, for that perhaps they may be real Chattels, *viz.* Lands leased to the Testator, or other Lands of him appointed to be sold for payment of Debts, which, as heretofore hath been held, a Jury of another County cannot finde. Besides, although such a forein Jury may finde other movable *Assets*, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then

2 M<sub>1</sub>. Bro.  
Attaint 104.  
& 10 E<sub>1</sub>.  
Dyer 271.  
Because lo-  
cal & fixed,  
otherwise  
held, 3 Fac.  
in com. ba.  
Co. lib. 6. f.  
46, 47.  
22 E. 4. 9.  
& 2 M<sub>1</sub>.  
Bro. Att.  
104. 18 H. 7.  
Kelw. rep.  
51.a. So held  
P. 31. Et.  
in Scaccar.

may be the difference, viz. That if the ~~A~~  
sets be found to be in the County whe-  
the Triall is, there the Sheriff of that Cou-  
ty cannot return *Nulla bona*, without a  
ding, that the Executor hath wasted : b  
if there be no Verdict at all touching ~~A~~  
sets, Judgment passing against the Exec-  
tor upon a Demurrer, Confession, *Ni-  
dicit*, or the like ; there may the Sher-  
iff make such a Return of *Nulla bona Testat-  
ris*, without returning any Devastation  
and so also where the Verdict either find-  
eth *Assets* generally, not finding in wh-  
place they be ; or expressly findeth them  
to be in another County, as a little befor-  
we found may be done by a Jury of Lon-  
don of *Assets* in *Essex*.

So if the  
Process for  
Execution  
go into ano-  
ther County  
then where  
the Verdict  
found, as the  
difference  
was held in  
Seac. 31 El.  
28 H.8. Dy.  
30. b.  
Paf. 4 H. 8.  
rot. 303.  
4 El. Dyer  
210.  
But 3 H.6.  
12. without  
any Sci. fac.  
upon the  
Devast. re-  
turned, a  
*Cipias* was  
awarded by  
the Court ;  
and see 9. H.  
57. Bro. Ex.  
57. 4 L:b.  
mr. 320.  
A *Fieri fac.*  
absolutely  
and wi hout  
condition.

In King *Henry* the 8th his time, as  
little after the said *Chichester* is by th  
Lord Dyer reported, the Sheriff return-  
ing upon the *Fieri facias*, that the Execu-  
tors had no Goods of the Testator's, did  
add in the same Return, that one of the two  
Executors had wasted, and thereupon  
*Sci. fac.* was awarded against him ; & upon  
*Sci. faci* returned, & Default made, Execu-  
tion was adjudged, and awarded against  
his Goods only. And this course of *Sci. fac.*  
both the L. Dy. (as elsewhere I find it re-  
ported) & *Prisot temp. H. 6.* approved. But  
I an

I am perplexed with doubt what Plea the Executor coming in upon the *Scire facias* could plead; for except his deniall of Wasting might be pleaded contrary to the Sheriff's Return, and put in Issue, so as to cause a new Triall after a former, perhaps preceding, Judgment, which I think woulde not be admitted, then his coming in is to little purpose, for ought can conceive. Here again it must be observed, that in the Case of *Chichester* the Judgment was had upon triall of Fully administered; but in the other Case in the time of King *Henry the eighth* it was upon Confession; which is all one, as I take it, with condemnation upon Demurrer, or *Non sum informatus*, or Triall upon *Non est factum*, to the Bond, or a Release to the Testator, or the like. Now between all these and that of *Chichester* there is a broad difference: for there the Defendant being convinced by Verdict to have *Assets*; which if they continue not in his hands in kind must be answered out of his own Goods as wasted, therefore the *Fieri facias* to levy the Debt of the Testator's Goods, if any found, or in default thereof out of his own Goods, is very agreeable & pursuant; but innone of the other Cases is there any such Trial or conviction of the Defendant's

so 9 H. 6.  
49, 50. A  
manuscript  
report.

36 H. E. 3.  
And Mor-  
dant, 12 H.  
7. Kelw.  
rep. 24. But,  
*Vavasor*  
Just. and all  
the other  
Serjeants e  
contr. 2 El.  
D. 185.

dant's having *Assets*, so as it rests *equi-  
dubium* whether they have *Assets* or not  
and therefore it may seem somewhat har-  
and harsh to send out such a Writ in tha-  
Case; and so should I have thought, if  
had onely seen the Report of *Pettifer'*  
Case. But looking into the Record, & find-  
ing the Condemnation there to be by *Nihil  
dicit* in effect, I cannot uphold any di-  
stinction of course in respect of the said  
difference of Cases. Nor indeed doth the  
course there directed presume that the  
Executor either hath *Assets*, or hath waste-  
them, but commands that if *Assets*, &c  
then the levying shall be one way;  
Wasting, then another way: so if neither  
*Nihil fiend.*

## CHAP. XIV.

*Of an Executor of his own wrong.*

**T**O begin with some definition or de-  
scription of this man; He is such as  
takes upon him the Office of an Executor  
by intrusion, not being so constituted  
by the Testator or deceased, nor for  
want

ant of such Constitution substituted by  
the Ordinary to administer. Touching  
whom we will consider in these parts,  
and with this method, *viz.*

1. What acts or intermeddlings of such  
a one, not being Executor nor Adminis-  
trator by right, shall make him to become  
an Executor by wrong. *Vide* five more,  
*or Stat. 43 El. cap. 8.*

2. In what manner and by what name  
such shall be sued, specially when ano-  
ther then he is Executor or Administra-  
tor, or himself after such act becomes  
Administrator.

3. How far he becomes liable to Cre-  
ditors, and how, and to whom.

4. What acts done by him shall stand firm  
as if he had bin an Executor by right.

5. See a late Stat. 43 El. cap. 8. hereabout.

I. Point.  
I & 2 F. &  
M. Dy. 103.  
b.

As to the first, it was in the time of  
Queen *Mary* doubted, and not resol-  
ved, whether the onely seising and ta-  
king into one's hands the Goods of the de-  
ceased did make one Executor of his  
own wrong, without any farther act. And  
in the beginning of the late Queen's  
time the L. Dyer said, that the possession  
and occupation of or meddling with the  
Goods is that which gives notice to Cre-

I El. Dyer  
166 & 167.  
So also Bel-  
kn. 50 El.  
3. 9.

ditors whom they are to sue as Executor. But doubtless Creditors must look farther before Suit; for else can they not know whether he so intermeddling be Executor or Administrator; nor consequent how to found their Suit rightly and safely for good success; since a Suit agair an Executor as Administrator, or agair an Administrator as Executor, will prove ruinous, and fall to the ground. Yea when an Administrator sued as Executor did not plead that Administration was committed unto him, but generally denied that he was Executor, or administered Executor; the Lord *Dyer* held that it must be found for him, yet left it doubtfull: but the clear and safe way had been to have pleaded the Administration, &c. And in the former Case the Lord *Dyer* said, that one intermeddling only about the Funeral and laying out money therefore, an Overseer or Conductor, or he who had Letters of the Ordinary *ad colligend.* viz to get and keep the Goods in safety, and one who intermeddleth by virtue of a Will truely made, but controlled by a latter Will after found and proved, may free himself from being a Executor of his own wrong, by special pleading.

*13 & 14 El.  
Dy. 305, 306*

*1 E.D. 166,  
& 167. See  
Lib. mir.  
322. b.*

leading how or in what right he inter-  
meddled, and traversing his Administring in  
other manner : and that this Traverse need  
it, nay may not be, was held in the time  
King *Henry 6.* and *7.* for that such  
amount not to any Administring at  
; and where no Administring at all  
confessed, such a Traverse of not Ad-  
ministring in other manner is dissonant,  
and not legal. But let us look back upon  
these severall points exempted by the  
*Lord Dyer*, and we shall see some cau-  
ns necessary touching them and their  
entertainment. First, as touching the  
int of Burying the dead, it must be un-  
rstood to be with some expence of the  
ceased's Goods, and so it is expressed in  
the said Book of *Hen.* the *6.* his time : else  
if a man out of Charity to lay out of his  
mony (not intermeddling with the  
Goods of the deceased) to bury a friend,  
with little colour to involve him so do-  
ing in an Executorship by wrong. Ta-  
king the Case then, that such person laies  
out or expends of the deceased's Goods  
mony upon his Funeral, heed must be  
taken touching the measure and propor-  
tion whereabout. Though I can give no  
particular and distinct limit, yet doubt-  
lesse

12 H. 6. 28.

10 H. 7. 28.

Yet *Lib.* in-

tra. 321. b.

where he

confessed a-

bout Funer-

rall, he tra-

versed aliter.

*Lib.* intra.

321. where

by Letter ad

collig. he

traversed,

*Absq; hoc**quod &**Exec.*

21 H. 6. 21.

lesse either meer necessity, *viz.* Churc  
duties, &c. or at least decent Sutabi  
nessse to his quality, must be the bound  
And herein to speak as I think, this la  
ter must either be utterly excluded,  
held within very narrow compasse:  
what reason that a Knight or man  
higher quality, leaving (though perha  
entailed Lands of good value) yet God  
not sufficient to pay his Debts, shou  
have an hundred pounds or more of t  
which should satisfie Creditors spent  
pompous interring of him for his Wi  
ship and reputation? Next, Overse  
may onely be excused for seeking to pi  
serve and keep the Testator's Goo  
not in case they expend or dispose the  
of. So also for him who is authori  
by the Ordinary to collect; for if he

*Lib. int. 322.* or dispose of any, ( though Goods oth  
8 & 9 Eliz. wise subject to perishing ) it makes t  
*Dyer 355,*  
*256.* He sold an Executor by wrong, as was resol  
blended  
Corn, but  
there he  
pleaded not  
the special  
matter.  
ing that by the Ordinarie's Lettres  
was expressly directed or warranted so  
doe; for it was said, the Ordinary hi  
self could not so doe. As for him w  
administred by virtue of a Will after c  
proved, or controlled by a Letter,

not doubtlesse stand free for the Goods before administred, but either rightful or wrongful Executor standable to the Creditors. Nor doth every intermeddling by one out of all these uses and evasions as would be an ministration, make one an Executor wrong. If one do but take an Horse the deceased, and tie him in his House stable, this makes him not an Execu-

21 H.6.28.

, saith *Paston* a Justice, or like or intermeddlings; as he that delivers the Wife of the deceased her Apparel, least if it be no more then is convenient to her degree. But if she take, or ther deliver, more then such to her,

33 H.6.32.  
1 Eliz. Dy.  
166.

or he becomes an Executor by wrong. But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or Administration committed; for there such acts or intermeddlings shall not make one an Executor by wrong, as were there is no other of right to be su-

Tr. 37 Eliz.  
by Fenner.  
Just. If one  
doe any  
such act as  
pulls the  
Property  
out of the  
Executor,  
he is become  
an Executor  
by wrong.

As if one take Goods wrongfully from such a right Executor or Administrator, this (though he convert them to his own use) makes him not an Executor by wrong, but a Trespasser to the right-

If the Goods  
be aliened  
by fraud, he  
who takes  
them after  
the Execu-  
tor's death is  
an Executor  
by wrong.

*Tr. 37 Eliz.  
D. 5 E. 4.  
72. a.*

rightfull Executor or Administrator, even for these Goods, once *Assets* in hands, stands liable to Suits of Creditors, they being neither lawfully evicted nor rightly administered : but in case there has been no Executor at that time, or no Will proved, nor Administration committed, then such taking of the deceased's Goods into a strange hand had made an Executorship by wrong. And thus was the difference lately resolved, as is reported by L.Coke in the Case between *Read* and *Carter* in the *Common Pleas*.

*Tr. 2. Jac.  
in com.b.  
Co. lib. 5.  
53 & 54.*

*1 Eliz. D.  
260. b.*

*7 H. 5. 20.*

Yet this farther difference was held, *viz.* That although there be an Executor or Administrator by right, yet if a Stranger take upon him to receive Debts and make Acquittances, or to pay Debts claiming to be an Executor, he is sued as an Executor by this Act : and so it was in the late Q. time was held by 6 Just. touching the receipt of Debts and making Acquittances ; but the Book mentions whether any other Executor then were, not. But in the point of bare payment of Debts Frowick makes another difference, *viz.* If a Stranger do with his own money pay the Debts of a Friend deceased, and not with the Debtor's ; this

trust of Charity, and makes him not Executor by wrong : otherwise, if with the Debtor's money. Yet to this another difference must be added, *viz.* That he thus paying with his own money, have taken into his own hands Goods of deceased ; then is his payment premised as by or out of the value of these Goods, and so makes him an Executor by wrong. Contrarily, if he have no such Goods in his hands. And in the point of intermeddling with and disposing of the Testator's Goods, where another Executor is, this farther difference is to be added or understood, *viz.* That where the Goods so taken never came actually to the Executor's hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor, if he should by a possession in law cast upon him stand chargeable with these Goods in remote places purloyned, *Assets* in his hands ; so were it as mischievous to Creditors, if neither Executor be right, nor this Stranger as an Executor by wrong, should stand liable to Creditors for them. It is true, that the right Executor may sue and recover Damages for them, and that so recovered shall be *Assets* ;

*Assets* ; but the Creditor hath no m  
at the Common Law to inforce him  
sue, and perhaps it may be a cold S  
And with these Additions I think  
late resolved difference may stand f  
and sound. Yet in former times, with  
such difference, the taking onely and p  
session of the Goods of the deceased  
held to create an Executorship by wro  
as *Belknap* said in the time of King E  
the third ; and especially if the Act w  
such as removed the Property of the ri  
Executor , as Justice *Fenner* in the l  
Queen's time said, *teste meipso.*

50 E. 3.  
fol. 9.

Tr. 3. Eli.

*How and by what name Suit shall be  
against such and the like.*

2. Point.

L. 5 E. 4.  
72. Co. lib.  
5. 30, 31,  
& 32. b. 21  
H. 6. 8.

**T**ouching the second Point, viz.  
what manner Suit shall be agai  
such: First, in general , this usurp  
Executor is not in Suit to be distinguish  
by name from the right Executor, b  
to be sued generally by the name of Ex  
cutor of the last Will and Testament  
the Defunct ; and then if he will de  
himself so to be, he must plead that  
neither is Executor, nor hath admi  
stered as Executor. Then the Plaintiff

ust prove that he hath administered in  
one such or the like sort as aforesaid.  
nd it hath been divers times held, that  
ere there is a right Executor, and yet  
other doth administer by wrong, it is  
the election of Creditors either to sue  
em jointly together, or one or both of  
em severally and by himself. But if  
ere Administration is committed, a-  
ther also administers by wrong, these  
not be sued together as Administra-  
s ; for though one may be an Execu-  
by usurpation or wrong, yet none can  
ne to be an Administrator by wrong,  
ce no other but such as receiveth that  
ver from the Ordinary can so be :  
refore in that case there is a necessity  
suing him apart and by himself ( who  
usurpeth Administration ) by the  
one of an Executor.

So if *A* administer the Goods of *B*, not  
ng Executor nor Administrator, and  
er his such doing, and disposing of the  
Goods, he obtaineth Administration of  
the Goods of *B*, but the Goods left or  
cning to his hands since the Administra-  
tione committed suffice not without the o-  
ter Debts received or released, or Goods  
ed before, to satisfie Creditors : now  
if

Co. Li. in tra.  
154. But  
145. a. in  
the Verdict  
he is called  
Exec. de  
injuria sua  
propria. 39  
H. 6. 45,  
46. 21 H. 8.  
§. 19. 9 E. 4.  
14, 15. 1 &  
2 P. & M.  
Dyer 165.  
33 H. 6.  
38.

25 H. 6. 31.

R. 3. 20.

21 H. 6. 8.  
If the Ad-  
ministration  
were com-  
mitted be-  
fore the Suit  
began, the  
VVrit shall  
abate, else  
not, as was  
of old con-  
ceived.

if any sue *A* by the name of Adminis-  
trator, he shall have no farther Relief th-  
according to the value or extent of t  
Goods left in or come into his hands sin-  
the Administration committed ; and  
those be fully administred, he shall g-  
nothing ; if they remain unadministre-  
but amount not fully to his Debt, he mi-  
want so much of satisfaction ; and if  
will be relieved, or satisfied out of t  
Goods before disposed of, he must sue  
as Executor of *B*. And so was it ruled a-  
resolved by *Gawdy* and *Suit*, Justices  
the King's Bench , in the late Queen  
time, viz. Tr. 30 Eliz. And if this no  
Administrator will plead in Abatement  
this Action that Administration was com-  
mitted to him, and demand Judgme-  
if Suit shall be against him as Execut-  
then the Plaintiff must in the Replica-  
on, as I take it, set forth the special ma-  
ter, viz. how the Defendant did admis-  
ster before Administration to him com-  
mitted. But if one to whom Administra-  
on is committed doe devast, and this Ad-  
ministration is by Suit repealed, becau-  
he was not the next of kin, and Adm-  
istration is committed to another ; no  
a Creditor who would be relieved out

the Goods wasted, must sue that first as Administrator, and not as Executor of his own wrong, said *Popham* Chief Justice, & he did rightfully administer for that *Vid. 8. 185.* me.

S for the third, *viz.* How far this *3. Point.*  
*A* Executor of his own wrong becomes *How far lia-  
ble and obnoxious to Suit ; consider we  
ditors.* these things.

First, he becomes subject both to the Action of the Executor, who hath right to the Goods wrongfully intermeddled with by him, though it were before proving the Will ; and also to the Action of the creditor, who hath right to the Satisfaction of his Debt,

Secondly, as touching the measure how far he is ingaged, doubtless he is not by his wrongfull Administiring become chargeable with the whole Account of the testator's Debts; but only so far, and with much thereof, as the Goods which he wrongfully administered amount unto. Yet he must look to his Plea, else by it he may draw all sued for upon himself ; if he deny his being Executor or Administrator. ) And this seems to me proved by the Case in the time of *Edw.* the third, where the Inquest found

Cō. lib. intro.  
1445 1450  
Plus de hocce

S

not

not onely the Administring or intermeddling by the Executor wrongfully, found also, by direction of the Court, (it seemeth) what the value was of Goods so wrongfully administred, wh had not been material, if the Administring of a peny had made one as chargeable as the Administring of pound. Besides, if it be so that a righfull Executor wasting Goods of the Testator to the value of 20/. shall be farther charged then that value, th doubtless so shall it be also in this case for both be wrongfull Administrations: onely this difference there is betwe them, that in one case the Administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord Dyer doth not stick to call him who administreth wrongfully, or in undue manner, expressly an Executor by wrong, in the Case of *Steeks* against *Porter*, though he were rightfully Executor, because he did dispose or execute wrongfully.

*4 Poin~~t~~.*  
What acts of  
his off for e.

*A*S to the fourth, viz. What acts done to him or by him who is an Executor of his own wrong shall stand firm and good, as done by or to the right Executor

or : Suppose, first, that the deceased were indebted to him 20/. who thus u-  
peth Executorship , whether may he himself or not? And this point was debate in the *King's Bench* between *letter and one Ireland, Executor of Hunt,* <sup>M.40,41 E.  
Co. lib, 5, f.  
30.</sup> here it was strongly objected , that notwithstanding the rightfull Executor or ministrator might punish him , and reaver against him , for the Goods which administrereth ; yet another Creditor su- him as Executor generally , and so af- faining him to be , (for there is no speciall Writ or Declaration to distinguish Executor by wrong from a rightfull Ex- tor ) he stands as against him in the place of a rightfull Executor , and therefore my first pay himself before he pay o- rs : and of that mind at the first were *inner and Gandy Justices* ; yet did they admit that this payment should not stand god as against the rightfull Executor or ministrator. And *Popham and Clinche* had strongly , that neither shoule it stand god against other Creditors ; for then every man would rush upon the Testator's Goods , and be his own Carver in payment. And whereas it was said at the Bar , that Lord *Anderson* , upon an Evidence at

*Guild-hall* had ruled it otherwise, *Popl*  
at another day of debate of the said C  
related, that the Lord *Anderson* did d  
that he ever so ruled, or was of that op  
on; and farther informed, that both he  
Justice *Walmley*, *Periam* and *Clark*,  
rons, did agree with *Popham* and *Clinch*  
opinion. After which, Justice *Gardy*,  
also *Fenner*, if I mistake not, changing th  
opinions, and concurring with the r  
Judgment was given accordingly. In  
debate of this Case question was ma  
If such an Executor by wrong pay a D  
to another Creditor by Specialty, whet  
this shall not stand firm and good, since  
stands liable to Creditors so far as  
Goods by him administred do amou  
And it was agreed, by the better opin  
at least, that this should stand firm &  
good; so as if the payment were out  
his own Goods, he might retain to him  
in lieu thereof so much of the Goods  
the Testator: for here he doth not, as  
the other Case, advantage himself by  
own wrong. Yet that opinion, allowi  
this payment to Creditors, must, as I thi  
be understood with this difference, vi  
that this payment shall stand as again  
other Creditors, but not as against t  
rig

nt Executor or Administrator : for then  
y Stranger might usurp the Office of Ex-  
itor, and take from him that liberty and  
ction, to prefer which Creditor he will  
first payment ; yea , might take from  
Executor power to pay himself before  
er, in case there were a Debt due to  
, which were very unreasonable.

*Addition and Alteration by the Statute  
43 Eliz. cap. 8.*

WE having considered what the Com- 5. *Point.*  
mon Law is and willeth in the  
emisses : let us now see what Alterati-  
or Addition a late Statute hath made.  
the last Parliament of the late Queen  
zabeth, consideration being had of sub-  
getting into mens hands Goods of an  
estate by Deed of Gift , or Letter of  
turny, from one of small or no ability, to  
om such subtile Contriver hath procu-  
d Administration to be committed, and  
himself would stand free from the Suit  
Creditors, the Administrator himself  
her not being to be found, or not be-  
of any value to satisfie Creditors ; it  
s therefore enacted, that every person  
eiving or having any Goods or Debts

of any Intestate, or any Release or Discharge of any Debt or Duty belonging him upon any Fraud, as aforesaid, or without consideration of or near the value, (except in satisfaction of some just and principal Debt, to the value of the Goods Debts due from the Intestate) shall be charged as Executor of his own wrong so far as the value of those Goods and Debts amount, deducting all principal Debts to him due, and Payments him made, which a lawful Executor ought to have payd. Here have we a touch all the parts precedent, or at least three of them.

1. We have first a new Executor wrong, though intermeddling under the title of an Administrator.

2. We have a limit of the Charge him incurred, suitable to our former expression.

3. Lastly, we have to him an allowance of Debts owing to himself, or discharged to others; which is more than I have conceived allowable to another Executor by wrong.

## CHAP. XV.

*Pleas by Executors, and which be lost,  
which most prejudicial to them.*

Ince amidst the Pleas pleaded by Executors there is such difference, as at some induce one kind of Judgment, me another, some drawing more loss and burthen upon Executors then others: let us consider of the differences, so as right may be taken to chuse the safest or best for each case.

If an Executor do utterly estrange himself from the Executorship, saying, that he was never Executor, nor ever administered as Executor, (for that must be added) then if the Issue be taken upon the Plea, and be found against him, the Plaintiffs shall have Judgment to recover, not Damages only, but even the Debt it self, out of the proper Goods of the Executor, if none of the Testator's can be found to satisfie it. And this shall be thus not onely where it is found that the Defendant was made Executor by the Will, and proved it, and so could not chuse but know it; but even also

Plea deny-  
ing the Exe-  
cutorship,  
21 H. 6. 19,  
20. Br. 62.  
2 E. 4. f. 4.  
19 H. 7. 15.

Lib. intr.  
322, 333.  
33 H. 6. 33,  
34.

where he had never proved the Will whereof he was made Executor, nor ever Administred by virtue thereof: yea, though he did before the Ordinary refuse to be Executor of this Will, or to intermedd with the Execution thereof; yet if another named Executor with him did prove the Will, or did not refuse to be Executor, let such other Refuser take heed of pleading that Plea. For truth is against the first part of his Plea, *viz.* that he never was Executor; and so the Verdict, which must be *Veritatis dictum*, must needs pass against him, and make his own Goods liable as well to Debts as Damages. What if no other were made Executor but this one, who refused before the Ordinary? may he safely plead that he never was Executor I think not, since he so was Executor before his Refusal, that he might have released all Debts due to the Testator, and given away all his Goods; therefore I think he must plead specially, shewing his Refusal and not generally deny his being Executor. Nay, admit he never was once named, made, or intended to be made Executor, yet having pleaded this Plea, that he never was Executor nor administred as Executor, if it shall be found by Verdict that he

He was suitable as soon as the Testator was dead.

did administer or intermeddle as Executor, the same blow or burthen falleth upon him: for then the latter part of this Plea is found untrue, yea the whole upon this matter, for by this Administring he became an Executor of his own wrong, and the deniall of this Executorship by wrong or usurpation shall be as penall to him as the denial of a rightfull Executorship. The like Law, where the Executor pleads a Release made to himself, or a payment of the Debt, or other performance of the Condition made by himself. Nay, find in this latter Case the Judgment entered generally against the Defendant, against another for his own Debt, not being Executor. And the reason why the law makes these so penal to an Executor, because his Plea is not onely false, but the falsehood thereof was wilfull, since it must of necessity be known to himself to be so. And lastly, for that all these pleas, if they had proved true, had been perpetual Barrs, at least against the Defendant: the first indeed had not been a Barr against another, being in truth Executor or Administrator. But if the Executor had pleaded a Release made to his Testator, finding such a one among his Writings,

But if he did it as Administrator, it is otherwise; yet see that specially pleaded Co. lib. Intr. 148. a.

See Co. lib. Intrat, Judgment so entred, 145. b. Read and Carter's Case.

Co. lib. Intr. 29. a. not first *de bonis Testatoris si, &c.*

See Bro. Ex. 22. these reasons? for this diff.

23 H.6.232  
24.

which

So of other which yet was either forged, or new  
 Perform. Co. both sealed and delivered by the Plaintiff  
 Lib. intr. 153. and as his Deed; or if he plead payme.  
 6 E. 4. I. 7 made by his Testator; neither of the  
 E. 4. 8. See Brv. Ex. 22. Pleas found against him shall cause the  
 That the Judgement to fasten upon his own Goods  
 Book con- so if he denied the Bond or Bill, where  
 trarily re- upon the Suit is grounded, to be the Te  
 ported 34 stator's Deed. For in all these Cases the  
 H. 6. 22, 23. is errone-ous, as was truth being not known to him, he might  
 ously, as was defcried by Fitz. & al. honestly and reasonably conceive it to  
 23 H. 8. be as he did plead. But what if he  
 the Record plead Fully administered, and this be  
 being not so found against him, which rested in his  
 as the Book faith the own knowledge? Shall not this false  
 Judgment was. Plea expose his own Goods, in defect  
 of his Testator's, to the satisfaction of  
 this Debt? No, it shall not, for that though  
 this were a false Plea, and that within his  
 own knowledge, yet was it not a perpe-  
 tual Bar; for if it had been so found as  
 was pleaded, yet *Assets* coming after to  
 the hand of the Executor, the Plaintiff  
 should then have Relief and Satisfaction  
 out of these since accrued *Assets*. If any  
 ask how *Assets* may after come, I will give  
 him two or three instances. First, it may  
 be by recovery of Debts before withhold-  
 en or of Damages for Goods taken away,

or

by voluntary payment of a Debt not before due, for that the time of payment is not come. Secondly, if the Testator, giving a Lease for twenty years, did demise the same to *F S* for the whole term, if he so long should live; if he were alive in time of the former Verdict, but now is dead, the term continuing; this is now *Assets*, which before was not, whilst it was but a possibility of a term. Other instances might be given, but these may suffice. If the Executor pleaded that the Testator stood bound in such a Statute, or that there was such a Judgment against him of Debt to the King, beyond the satisfaction whereof the Goods would not reach; this is in effect a Fully admitted, though special, and not general; and the Law is alike (as I take it) in all these cases, as to the not making of the Executor's Goods liable. But in all these cases, though the Debt shall not be adjudged upon the Executor's own Goods, yet the Damages shall, in default of the Executor's Goods to satisfy them. And in these cases it is not material whether the Judgment passed upon Trial or Demurrer. Nay, if the Defendant Executor plead no Plea, but confess the Action generally, or

*Lib. intr.*  
148, 149.  
This good,  
though the  
Judg. were  
by *non sum*  
*inform.* and  
an averment  
that it was  
without Co-  
vin.  
*Co. Lib. intr.*  
152.  
11 H. 4. 6.  
There a *Cap.*  
*ad sat.* was  
awarded for  
the Damma-  
ges.

But he may, I chink, forbear so to doe, and to the Judgment for partial, that when more Assets come, he shall have more. *Lib.*  
*Intrat. fol.*  
223.

or be condemned by *Non sum informatus* the Judgment is the same, viz. to record the Debt onely out of the Testator Goods, and the Dammages of the Executor's Goods in default of the Testator's What if the Executor Defendant confess that he have *Assets* to the value of part of the Debt, not of the whole ? Therefor so much as is confessed the Plaintiff may pray, and have Judgment presently without Dammages, and may maintain for the residue of the Debt, that the Defendant also hath *Assets* for the rest, and so goe to Triall; as appears both by the printed Book of Entries, and another Manuscript which I have. But what if this Triall pass against the Plaintiff ? Shall he then have an additional Judgment for Dammages in respect of the former ? I think he shall have Costs, which commonly run with or in the name of Dammages ; but without a Writ to enquire of Dammages, none being found by Verdicts, the Court doth not usually adjudge Dammages. Yet in the Book of *Entries* I find 6s.8d. Dammages assed by the Court upon a Confession in a Writ of *Rationab. part. bonorum* against Exec. and this hath much affinity with an Action of Debt. Yea, in the very Action of Debt where the Jurors

ors for miscarriage after their departure  
om the Bar were fined , I find that the  
plaintiff renouncing the Assesement of  
ammages by them made, and praying the  
ourt to assess the same, it was done ac-  
ordingly : but this was a special Case.

M.28.H.6.  
R.o.a.321.  
Lib. Intrat.  
329.a.

Whereas we before shewed that an  
xecutor denying his Executorship shall,  
it be found against him , pay the Debt  
f his own Goods for his false Plea ; this  
hereabout occurreth to be added, *viz.* that  
hat is onely where the immediate Exe-  
utorship of the Defendant is denied.  
For if *B* be made Executor by *A*, and *B* dy-  
ng makes *C* his Executor ; now if *C* be  
ued for the Debt of *A* as Executor of *B*  
Executor of *A*, and he denieth that *B* was  
Executor of *A*, which by consequence is a  
lenial of his being now Executor of *A* ;  
yet if this fall out in Triall against him, he  
hall not in his own Goods stand liable to  
his Debt, because it is possible that he  
night not know to whom his Testator  
was Executor. So if *A* made *B*, *C* and *D*  
his Executors, and *E* is sued as Executor  
of *D*, the surviving Executor of *A*, if *E* de-  
ny that *D* his Testator survived *B* and *C*,  
by consequence whereof he denieth the  
truth, *viz.* that the Executorship of *A* is  
de-

See lib. Intr.  
322.

devolved to him, yet shall not this, found against him, charge his own Goods; for he might be ignorant of this point in fact, *viz.* whether *B*, *C*, or *D*, lived the longest. And here he denied not his own immediate Executorship, but a mediate or more remote Executorship. And so, I think, is the Law, where *C* being sued as Executor of *B*, Executor of *A*, he pleads that *A* by a latter Testament made himself Executor, which is found against him; so as here he falsely pleaded, and pretended himself to be the immediate Executor of *A*, and so denied the immediate Executorship, *viz.* of *B* to *A*, and of him to *B*. Yet *Quære* of this: for why should not as well his false making himself an Executor immediate to the indebted Testator charge his own Goods, as well as his false denying of that Executorship; since both Pleas tend to the overthrow of the Plaintiff's Action, and each equally rested in the Defendant's knowledge? But this difference is between them apparent, *viz.* That the denial of Executorship, if true, is an utter and perpetual Bar to the Plaintiff, as against him so pleading; but the affirming of an immediate Executorship, where he was sued

ed as Executor mediate, doth not so, if  
ue, but directs the Plaintiff to a better  
Writ or Action, *viz.* against him as im-  
mediate Executor to the indebted Testa-  
tor.

Whereas we have before touched upon  
the coming of *Assets* futurely to Execu-  
tors, I think it is not amiss to consider a  
little the form and frame usual in Pleas of  
fully administered, which thus run, *viz.*

*Quod die inspetr. &c. plenè administravit Lib. int. 151.  
annia bona & catalla quæ fuerunt præd.  
temp. mortis sue, & nihil hab. de bo-  
nis, &c. quæ fuer. præd. S. temp. mor-  
s, &c.*

Thus tying his denial upon the things  
which were the Testator's at the time of  
his death, what if then the Executor  
ave at the time of this Plea pleaded  
Goods which were not the Testator's at  
his death, but since accrued, as before  
shewed; or perhaps a Lease for years  
old by the Testator, upon condition to  
be void, if five hundred pounds not paid  
such a day, which happening after the  
Testator's death, and Default made, the  
Term returneth; or, if the Executor  
by a Writ of Error reverse a Judgment  
given against his Testator for two hun-  
dred

7 H. 4. 39.  
B. 50. This  
Plea is not  
good, *per*  
*Cur.* because  
some may  
have since  
accrued.

dred pounds, and so is restored thereunto? may the Plaintiff now reply generally, that he hath *Assets* which were Testator's at the time of his death? He can the Jury so find, when the truth is not so? Surely this case is not common, nor can I shew a Precedent of a special Plea therein. But in reason methinks should be specially, and not general, pleaded and set forth in the Replication. And in case where one sued as Executor denieth that he was ever Executor or administered as Executor, I find sometimes in the Replication general, that he did a minister, without shewing wherein how; and sometimes special, shewing what thing was administered, and when. Here note, that the Executor Defendant denying (as he must) two things, *viz.* 1. that he ever was Executor, 2. that he ever administered as Executor; the Plaintiff in his Replication is tied to maintain but the one of them, as the truth of the case is: that is, if in truth the Defendant were made Executor, but never did administer, now it must be replied that he was made Executor at such a place without speaking any thing of his Administring: on the other side, if he di-

*Lib. intrat.*  
322.a.b. but  
a place must  
be shewed.  
So 11 H.6.  
19,20. Br.  
62.

Administer; but was not made Executor, when only the Administring is to be replied. But if it shall be found that the Defendant had Administration to him committed, and so administered by virtue thereof, then is the Verdict to passe for the Defendant, for this is no Administring as Executor; and upon a general denial thereof this may be given in Evidence, as the Lord *Dyer* reports to have been resolved. But if the Plaintiff do in his Replication maintain both the Points, shall this make his Plea double? Methinks it should; yet I find it so replied, and no exception taken for the Doubleness, *Tr. 17 H. 8. Rot. 28.*

A Sole woman being Executor maketh a Deed of gift of the Testator's Goods in trust, but continueth possession of them, and marrieth *F S*, who also hath possession of the Goods, and in an Action of Debt by a Creditor Fully administered is pleaded: now upon Evidence the Verdict shall pass for the Plaintiff; for this Alienation, being fraudulent, was void as to all Creditors, and so as to the Plaintiff the Goods continued the Testator's, and so *Assets* in the Defendant's hands, as was held in the King's Bench. If Fully administered be

T

pleaded

So done Co:  
Li. intr.  
104. b.

Mich. 13 &  
14 El. Dy.  
30.

Lib. intra:  
312. b.  
Tr. 37 Eliz.

Yet Finch  
46 E.3. f. 9,  
10. held the  
contrary,  
*viz.* that  
Judgment  
should be of  
the whole,  
but Executi-  
on onely for  
so much, and  
a *Scire fac.*  
for the rest  
when more  
*Assets.*

See Coke  
1.8. fol. 134.

pledged where the Defendant hath *Assets*,  
for part, but not sufficient for all, and  
it is found; yet shall not Judgment be g-  
iven for the whole; but for part presentl-  
with a farther Award, that when mo-  
shall come to the Executor's hand, t-  
Plaintiff shall then have farther Judg-  
ment for the rest: so as that false Pl-  
doth him no prejudice, but makes him  
as good state (the charges of Trial exce-  
ted) as if he had confessed himself to ha-  
part: And I think the Plaintiff upon th-  
confession of part may pray the li-  
Judgement, without maintaining that t-  
Defendant hath sufficient for the rest; t-  
if that be not true, why should he be p-  
to the charge of a Trial by Jury? Ye-

Sir Edw. Coke at the Bar Tr. 36 Eli.  
said, that where Fully administréd is ple-  
ded, the Plaintiff is not tied to maintai-  
the contrary, but may presently pr-  
and have Judgment to recover it wh-  
*Assets* shall futurely come to the De-  
fendant's hands: which was denied by son  
But truly methinks the Law should  
as he said, as well as in the former ca-  
where for the part which the Defenda-  
had not *Assets* to pay, it so was done, up-  
Verdict so finding. But there, as I con-  
ceiv-

Affive, it was not a present Judgment, but  
 and Award that he should have Judgment  
 e surely ; so as after when *Assets* come to  
 the Defendant's hands, the Plaintiff must  
 move a *Scire facias* against the Defendant,  
 shew cause, not why he should not have  
 execution , but why he should not have  
 Judgment, as I take it : yea, where it is  
 found for the Defendant that he hath fully  
 ministred, yet was it held by all the Ju-  
 cies, 33 H.6. 23,24. and by *Prisot* 34 H.  
 24. that when *Assets* after come to his  
 hands , the Plaintiff shall have a *Scire  
 facias* to have Satisfaction out of them :  
 but there *Markham*, *Reverton* and *For-  
 pscue* were of contrary opinion , and so  
 as the whole Court 4 H.6. fo. 4. And it  
 stands with great reason, that where, upon  
 a Verdict fully found against the Plain-  
 iff, Judgment is given *Quod nihil capiat*  
*er Breve*, there he cannot have any Writ  
 to execute the Judgment for him, but is  
 put to a new Action of Debt : yet where it  
 is found that the Defendant hath *Assets*  
 or part of the Debt, but not sufficient for  
 the whole, there it is very congruous that  
 the Plaintiff have presently Judgment for  
 part, and after, when more cometh, then by  
*Scire facias* against the Defendant obtain

so 19 H.6.  
 f.37. 8 E. 4.  
 fol. 25. See

Judgment  
 so entered  
 Co. lib.int.

so 7E.4.f.7.

Judgment and Execution for the rest : here both Verdict and Judgment were for the Plaintiff against the Defendant, who Plea that he had no Goods was false , also found by the Jury. And this difference was strongly avowed by Serjeant *Habham*, Mich. 33,34 Eliz. and after approved by *Fenner Just.* 36 Eliz. none contradicting it : yet a Book was cited, that the Plaintiff recovering so much as was found in the Executor's hands , should amerced for the residue ; which *Rapp* Chief Justice denied to be Law.

This 21 H.  
6. 40, 41.

## CHAP. XVI.

*Where Judgment shall be against the Executor's own Goods, though no Plea of Defendant nor Wastation do so occasion, and of the several manners of Judgment in several Cases.*

**H**OW by Wasting , called by us commonly a *Devastavit* , an Executor may draw down the Execution upon his own Goods , hath formerly been handled and discoursed of ; as also what kind

Pleas do make the Executor's own  
Goods liable to the Debt, and what not.  
Now let us see where without Misadmi-  
ssing or Mispleading, yet the nature  
of the Action shall lay the whole Debt or  
being recovered upon the Executor's own  
Goods. And this we shall find in some few  
cases. 1. Where an Executor is sued for  
rent behind after his Testator's death, up-  
on a Lease for years made to the Testator,  
and by him left to his Executor; here it  
shall be adjudged and levied upon his own  
Goods; for that so much of the Profits as  
the Rent amounted to shall be accounted  
as his own Goods, and not his Testator's;  
wherefore is he to be sued as well in the  
Debet as in the *Detinet*, where in other  
cases he is not, but in the *Detinet* onely,  
being sued as Executor. So if any thing de-  
livered to or detained by his Testator come  
to his hands, and he still detains the same  
after the demand, and be thereupon sued  
in an Action of *Detinue*; for this is his  
own act. Nor in this case need he to be  
named as Executor, for he shall not answer  
Damages for his Testator's detaining. So  
if he assume to pay of his Testator's having  
*Assets*, and be sued upon this *Assumpſit*, the  
which Debt is to be recovered in Damma-

ges, and that upon or out of the Executor's own Goods; yet is this Action, an the Assumption, which is the ground there of, founded in the Executorship, and having *Assets*; for if either he had not been Executor, or if he had not *Assets* at the time of the promise, it had been *Nandum pactum*, and would not have boun him, nor given good cause of Suit, Nay, goe farther, in the case of Assumption by the Testator, and Suit against the Executor thereupon, we find the Judgment in M. Plowden's Commentary given against the Executor generally, as if he had not been an Executor, not fixing it upon the Testator's Goods; yet there the very Debt self is included in the Damages. But contrarily was it after in the seventh year of the late King, viz. Judgment given that as well the Damages as the Cost should be levied of the Testator's Good if so much in value of them were in the Defendant's hands; and if not, then the Cost onely of the Goods of the Executor. And this surely is the righter and more just way: for there is no reason that upon Promise, more then upon a Bond, the Law should cast the whole Debt upon the back and slate of the Executor. But perhaps th

S. Marie,  
fol. 112.

Read and  
Norwood's  
Case.  
Co. lib. Intr.  
fol. 1, 2.

Two Judgments may be reconciled thus :  
the latter was given upon a Verdict, *Non  
sumpfit* being the Issue, and there the  
jury assessed Dammages in certain, *viz.*  
53 pounds, with the Costs ; so as here  
the Judgment was compleat and full, *viz.*  
to recover the said sum : but in the other  
case the Judgment was had upon a Demur-  
rer, so as the Dammages not being known,  
was generally that the Plaintiff should  
recover his Dammages against the Defen-  
dant. *Sed quia nescitur quædamna, &c.*  
because it appeareth not to the Court  
what the Dammages were, therefore a  
Writ was awarded to enquire of Damma-  
ges, upon the Return whereof executed,  
the Judgment was fully and compleatly to  
be given of a summe in certain : which  
second Judgment it appears not by the  
Book in what manner it was entred, and  
herefore might perhaps be then agreea-  
ble with the other. And that the said first  
Judgment before Dammages enquired of  
is not a plenary and full Judgment, but an  
Award of Judgment, hath been divers  
times resolved ; and that therefore any  
defect and insufficiency in the Declaration  
may be shewed time enough after the first,  
and before the second Judgment. Yea,

Tr. 30 Eliz.  
Pasc. 33 E.  
in com.  
base.

if the Plaintiff die before the second Judgment, though after the first, the Action falleth to the ground: so if the Defendant die: otherwise of death after full Judgment. But this notwithstanding, and howsoever there were done upon the second Judgment, methinks it were righter and fitter that the first Judgment should express that the Damages should be had and levied out of the Testator's Good for whom and in whose right the Executor is sued.

Another Case there is where in the Judgment must be, as it seems, against the Executor's own Goods, *viz.* in an Action of Covenant for a breach of Covenant since the Testator's death: for so was it held both by all the Judges of Common Plea, except the Lord Dyer, and by the Prothonotaries in the late Queen's time; where the Case was of an House upon the Lea negligently burned in the Executor's time for which Damages only were to be recovered. And sometimes where the Executor himself is so to bear the burthen, find the Judgment entred, that the sum recovered shall be levied of the Lands and Goods of the Executor.

So for Rent  
behind since  
the Testa-  
tor's death.  
Co. L. 5. fo. 31.  
The Suit is  
in the Debet  
as for his  
own Debt,  
M. 14 &  
15 El.

Lib. intra.  
329. a. & b.  
De terris &  
cataulis, &c.

## CHAP. XVII.

*Of Women-covert Executors.*

Here being two kind of persons who have some disability upon them, viz. Feme-coverts or married women, and Incurants, touching whom we find in many cases question and disceptation in our books, we will consider of them by themselves, or apart from others ; yet not joyning them together neither, but each by himself separately.

First, therefore, of Feme-coverts; touching whom we will consider these three things.

First, whether they may make Wills and Executors with or without their Husbands assent ; and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husband's assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the Executorship they may doe without their

Hus-

Husbands, or their Husbands with them.

*Sect. I.* A Woman married, or Feme-cove we know is *sub potestate viri*, *cui in vi contradicere non potest*, as saith the W given by the Law to the Wife for recovery of her Land after her Husband's deat being aliened by him. Therefore is that Judges, when a Woman is to a knowledge a Fine of any Land, do examine her apart from her Husband, to know whether she be willing, or com to doe it by the compulsion of her Husband: It is therefore hard for her to have freedome of will, and consequently freedome to make a Will. Besides, all he Moveables or Goods personal, which sh had at the time of her Marriage, other wise then as Executrix or Administratrix are by the Law totally devested out of her and settled in the Husband as fully *ipso facto* upon the very Marriage, as any other that were his own before. O these therefore she can make no disposition, no more then of other her Husband's Goods. But in case she do by Will bequeath them, although the Will and Gift be void, yet if the Husband, as the case was in the time of *Edward the second,*

*Sola & se-  
creta exami-  
nata.*

*Debts ex-  
cept, which  
are not pro-  
perly goods.*

*5 E.2 Fitz.  
Devis 24.*

and, do after his Wife's death consent this her Will and Gift, by delivering the Goods bequeathed after her death, assenting that the Legatee take them by virtue of such Will and Gift; this amounteth to a new Gift by the Husband. If a Woman have a Lease, an Estate by tent, a Wardship, the next Avoidance a Church, or other Chattel real; these are not devested out of her into her Husband by Marriage, but in case she over-  
live him, they continue to her as before, by Alienation or Alteration having been made by the Husband, who had power dispose of them by Gift in his life-time, though not by his Will: yet such a Woman in her Husband's life-time could not give or for these things, without her Husband's assent, make an Executor or Will; but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a Case, though not frequent, yet full of mischief when it happens: Suppose that a Woman indebted a thousand pounds, and having Leases and moveable Goods to the value of three thousand or four thousand pounds, marrieth with *J S*, and then dieth before the Debt be recovered against

During her  
life he is, but  
not after.

But the Hus-  
band may  
receive them  
or release  
them.

12 H.7.f.22.  
The Hus-  
band was  
sued in Spi-  
ritual Court  
as Executor  
to his Wife.  
So she is of-  
ten to for-  
mer Hus-  
band and to  
Father, &c.

gainst her ; in this case the Husband sha  
have and go away with all this value  
his Wife, and is not in Law liable to pa  
one peny of her Debts , because he i  
neither her Executor nor Administrator  
What the *Chancery* could doe, or rathe  
what the Lord Chancellor or Lord Keep  
er would doe, in this case, I will not tak  
upon me to say or determine. Anothe  
sort or kind of Goods, or rather Interests  
a Woman may have, *viz.* Debts or thing  
in Action, which, as the former , are no  
devested out of her by Marriage into he  
Husband, nor yet can she thereof make  
an Executor without her Husband's assent  
although they be one degree farther fron  
the Husband then the said Chattels reals  
for that though the Husband do over-live  
the Wife , he shall not be intitled to  
them as to the former. But if his Wife  
make him Executor, as she may , or if af  
ter her death he take Administration of  
her Goods ; then, as he is thereby intitled  
to them , so is he liable also to pay her  
Debts out of the same , when he shall  
have received them.

Lastly , *Dato* that a Wom in-covert is  
Executrix to some other person , and in  
that right hath Goods moveable ; these  
are

she not devested out of her, because she hath them not meerly to her own use, but as representing the person of another: But whether then may she without her Husband's licence or assent, in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will, or not? Hereabout hath been much diversity of opinion. Some Books generally speak, that the Wife may make an Executor, but speak nothing of the Husband's assent, whether necessary or not. Elsewhere we find it mentioned, that if the Husband after the Wife's death countermand (some Books, false printed, say command) the proving of his Wife's Will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this Wife stood, *viz.* whether she were Executor or not, no not so much as whether she had any thing in Action, or Chattel real or not, so as nothing in particularity can be grounded upon that Case. But there are express opinions, that the Husband's assent is absolutely necessary even in this case, so as without it the Wife's making an Executor shall be meerly void, and, consequently,

39 H.6.f.27.

34 H.8.f.8.  
Bro. Testa-  
mentis 21.18 E.4.f.11.  
Vavasor  
Just.

quently, he to whom she was Executed shall now by her death be dead Intestate.

And of this opinion was *Babington*, chi-

**4 H.6.f.31.** Justice, in the beginning of *Henry* the sixth his time. Yet contrary hereunto

**12 H.7.24.b.** was the opinion of *Fineux* chief Justice in the time of King *Henry* the seventh, viz. that where the Wife is an Executor she may also make a Will and an Executor without any consent or assent of her Husband. And to this opinion doth Ma-

**Tit. Devis. f.** ster *Perkins*, after consideration of the Books on both sides, incline. But some

**27.** will say, that since all this, in the late Queen's time this hath been contraril resolved, viz. in the case between *Andrew Ognell* Plaintiff, and *Underhill* an *Appleby* Defendants; in the end of which Case it is in express terms said to have been then resolved, that a Feme-covert or Married Woman could not make an Executor without the consent of her Husband. To this I answer, that this

**Coke lib.4.  
81.b.** Case is to be construed with relation ad materiam subjectam, viz. to the matter and point in question and under consideration, which was that state of a Woman whereof we have before spoken, viz. one having things in Action

Debt.

bts or Duties to her belonging, as there particular it was Arrearages of Rent due the Woman before Marriage. As for the point of a Woman Executor to another person; it was never in that Case under disceptation, no nor once mentioned in the Debate or Arguments thereon. Now considering the very formal phrase of Judgments at the Common Law, which are thus, *viz.* *Ideo consideratum est per Curiam, &c.* not, *Adjudicatum est*, that is, It is considered by the Court, not in expresse terms, that It is adjudged; this, I say, well observed, is to me it seems very remarkable) gives us to know, that no more is adjudged than is considered of, the Judgment being contained and clasped up in the word *Consideratum est*. Wherefore since Ognell's Case the point of a Woman-Spouse's ability, in case where she is an Executor, to make a Will and Executor, hath not been considered of, (the yes, tongues, nor thoughts of the Judges being once set upon it;) it cannot be that that Point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seems, the reason of that resolution, it appears not

not to have been the Intent of the Judges, that the same should reach or tend to this Case of a Woman-covExecutor : for it is added, (as the reason of the Judgment, in my conceiving that the Administration of the Wife's Goods doth of right belong to the Husband ; which amounts to this, in my understanding, *viz.* that where the Wife makes her Will, and consequently an Executor, may be prejudicial to the Husband, and prevent him of some benefit or advantage, or tend to his loss and disadvantage, there it shall not be available or effectual without his assent and therefore not in the Case of a Wife, having Debts or Duties to her discharge, would, by making another to be her Executor, exclude or preclude her Husband from that benefit which to him should pertain as Administrator of her Goods. Now as for the Goods, Debts or Creditors to her as Executor to some other pertaining, no benefit could redound to the Husband by having such Administration of his Wife's Goods, for those should go and be to the next of kin of the Wife Testator, taking Administration *de bono non administratis* of him, if she have i Exec

Executor ; and therefore her making Executor as touching these brings no hurt prejudice to her Husband , and so is it of the reason of *Ognell's Case*. Since then it is so, and since the Law favoureth Wills, and it was by implication part of his Will who made her Executor , that he should have power to continue his Executorship, by making another to succeed therein after her decease , for performance of his Will ; why should the law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto ? for , *Frustra est utilis potentia*; even Reason it self frames and awards against him in this Case a *Quare impedit*, or rather a *Non impedit*, as to me it seems. Wherefore to conclude, I take it that the opinion of *Finneux* is good Law in that Point of a Feme-covert Executor , though not in the other Point, where she onely hath Debts or things in Action to her self due : for therein the said Resolution in *Ognell's Case*, grounded upon good Reason, gives me satisfaction to differ from *Fin.* who, making no difference between the Cases, held the Husband's assent needless in both. *Posito* then that the Wife of *JS*, having Debts due to her self,

and being also Executrix to *f D*, make without her Husband's assent *f N* her Executor, and dieth; what shall we now say? shall we say, that as touching the Goods and Credits or things in Action in her as Executrix of *f D* pertaining, the Will stands good, and *f N*, as her Executor, may prove it, contrary to her Husband's will? and that as to the Credits to her self in her own right pertaining the Will is void, and thereof her Husband may take Administration? Shall she die both testate and intestate, with a Will and without a Will? shall she have both a Executor and Administrator? Why not to several purposes, as well as where an Executor is made onely for one particular thing or one place, the Testator may elsewhere die intestate? And so where the Executorship is divided, as before is shewed, and one to whom part is committed will prove the Will, but the other to whom other part of the Executorship is committed will not take it upon him; here must needs be a dying for part testate, and for part intestate.

As for the second Point, *viz.* Wives or Women-coverts being made Executors, and so having the office of Executorship

put

13 Ed. I.  
Fitz. Exec.  
119.

about upon them against their Husbands will, there hath also been diversity of opinion. In the time of King *Edw. I.* Brab. Justice saith, she may be Executor without her Husband, and the Administration shall be delivered to her onely. And I think he meant that this might be without the consent of her Husband, or whether he would or not; for so it is said in the time of King *Henry the seventh* to be the Law spiritual: and indeed in Courts Spiritual no difference is made between Women married and unmarried, for ought I can find. There a Wife sueth, and is sued, alone without her Husband; he intermeddleth not, nor is intermeddled withal, touching the things pertaining to his Wife. But at the Common Law it is otherwise; and there, as *Brian* chief Justice saith, a Wife without the assent of her Husband cannot be Executor, the meaning thereby that the Husband may oppose and hinder it; for such a one may be named Executor in and by a Will, without the knowledge of her Husband. Let us then see how after the death of the Testator the Husband can hinder her proving the Will, or intermeddling to Administer, since it may be a matter both of much trouble

trouble and danger to him to have the Executorship fasten upon his Wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the Husband; and therefore we will also consider, whether the Husband may (though his Wife would refuse) assume the Executorship, and fasten it upon her. The Testator therefore being dead, and fame or common bruit carrying it to the Ordinary, that the Wife of *JS* is made Executrix; if she come not in *gratis* or voluntarily to prove the Will, Process or Citation is to be sent out of the Spiritual Court against her, to enforce her coming in to take on her the Executorship. She coming may clearly, as well as any other person, (especially if her Husband concurred with her therein) refuse this office, trust and charge, so as if there be no other Executor named, the Ordinary must commit the Administration. If she should not come and appear, she should be Excommunicate, as I take it, notwithstanding any allegation or intimation by her Husband of his unwillingness to have her take upon her the Executorship. But suppose she doth come into Court, and offers her self ready to take the Executor-

hip upon her ; and on the other side her Husband expresseth his dis-assent thereto, praying that she may not have the execution of the Will to her committed : what will then be done ? This, I confess, certains to another Learning , and not to that of our Profession . But forasmuch as find, that in the Courts Spiritual a Wife stands in the same plight and state as a Woman sole , the Husband not intermeddled withall in the affairs of the Wife ; therefore do I conceive, that in that Court the Husband's refusall will not be of force to hinder the committing of the Executorship to the Wife not refusing ; at least if there come not a Prohibition to stay the Spiritual Court's such proceeding. But whether a Prohibition be in such a case to be granted or not, as I find no resolution in my Books, so will I not take upon me to resolve. This stands clear in the Rules of the Law of *England*, that the Wife is under the Husband's power, & cannot contradict him in pleading and doing other acts, even touching her own Freehold: nay, she cannot take Lands nor Goods by Gift or Conveyance without her Husband's assent, as the Law hath been, and, for ought I know, is taken. But if once the

33 H. 6. 31.  
43. 39 Ed.  
3. 1.

27 H. 8. 24.

Will be proved, and the execution thereo committed to the Wife, though against he Husband's mind and consent, I think will stand firm; and the Husband can Wife being after sued, cannot say that she was never Executrix. And I doubt whether the Wife administering without the Husband's privity and assent, although the Will be not proved, do not conclud her Husband as well as her self from saying after in any Suit against them, that she neither was Executor, nor did ever administer as Executor. Yet perhaps this Administration by the Wife against her Husband's mind will (as against him) be as

<sup>11 H.6.4.</sup>  
The Plea is,  
that the  
Feme did or  
did not ad-  
minister,  
without  
speaking of  
the Hus-  
band,

<sup>33 H.6.31.</sup>  
The Hus-  
band may  
administer,  
and prove  
the Will for  
his Wife.

a void act; else cannot I see how Brian's opinion before cited, viz. that the Wife shall not be an Executor without or against her Husband's mind, can be Law. On the other side, if the Husband of a Woman, named Executor, would have his Wife to take upon her the execution of the Will, and to prove the same, but she will not assent thereto, (wishing, perhaps, that gain and benefit rather to some of her kindred by a way of Administration, then to her own Husband by her Executanship, as sometimes Wives accord not well with their Husbands;) in this case I think

thereink the Court Spiritual will not fasten  
Executorship upon the Wife against  
her will. But *dato* that the Husband,  
though the Will be not proved, doth Ad-  
minister as in the Wife's right, but against  
her mind and will; shall she be now here-  
ithough bound and concluded, so as after she  
cannot decline or avoid the Executorship?  
And surely I think, that during her Hus-  
band's life she stands concluded at the  
Common Law, for that there she shall not  
be sued alone as Exec. and then  
being sued with him, she must joyn in Plea  
with him, *viz.* that she neither was Execu-  
tor nor administered as Executor; and then  
this act of her Husband's given in evidence  
will, as I take it, cause that the Verdict be  
found against her: not so after her Hus-  
band's death; then she may refuse, as the L.  
*Dyer* saith, and citeth as resolved. These  
things I thought good to offer to consid-  
eration, and so leave them without resolu-  
tion. Difference perhaps may be where a  
Woman so made Executor taketh a Hus-  
band after the Testator's death, before ei-  
ther proving or refusing to prove the Will,  
and where she is made Executor during the  
Coverture; as there in case of a dissent of  
her Land to the Heir of a Disseisor; for

I Eliz. Dyer  
166.b. there  
is cited  
3 H. rot. 112.  
Nota per:  
Bill.

when there is upon her such a state of Election, she, marrying before her Resolution or determination, doth upon the matter deliver it into the Husband's hands not so where it first findeth and falleth upon her in the state of Coverture. If the Husband were indebted to the Testator this making of the Wife Executor is, as I take it, a Release in Law, as well as if she were the Debtor: but if after the Testator's death she do marry such a Debtor, it is a Devastation.

### The third Point.

*Touching the Administration or Execution  
of the Office of an Executor by a Feme-  
covert and her Husband.*

WE will now come to admit the Execution of the Will assumed by concurrent consent of Husband and Wife, and the Will proved with both their likings in the Wife's name; and examine what acts the Wife of her self is able to doe, and what her Husband without her.

It hath been conceived by many of old, and by some of late, that if a Feme-covert or married Woman Executrix release a Debt

debt of her Testator, or give away the goods which she hath as Executor, or deliver a Legacy bequeathed, it was firm and good ; and on the other side, that her Husband's Gift or Release was of no value, for at the Administration or Execution of the Will is committed to the Wife only. And some have gone so far as to say, that she may sue or be sued without her Husband, ( in the Courts of Common Law, I mean; for in the Spiritual Court it is true, the Husband is not joyned with the Wife in suit. ) But the Law is doubtless in all those points contrary, as not onely some opinion so was of old, *viz.* in the time of H. 7. but also hath been in the late Queen's time resolved : for otherwise, if the Wife's Gift or Release should stand good, her act might exceedingly endammage her Husband, and make his Goods liable to the Creditors, the Testator's state being wasted by the Gifts or Releases of his Wife. Wherefore it was held in the said late Case, that unless due payment were made to such Women-covert Executors, their Releases or Acquittances be void, and so also their Gifts and Grants: yea, it was then held, that the Husband of the Wife Executrix may give goods, or make Releases of Debt, at his pleasure.

See 18 H. 6.  
4. In Debt  
the Plea  
shall be, that  
she hath ful-  
ly admini-  
stered; and  
Reply, that  
she hath *As-*  
*sets*, never  
mentioning  
the Hus-  
band.

33 H. 6. 34.

33 H.6.31.

pleasure. But doubtless by Marriage neither are the Goods (though personal) which the Wife hath as Executor devested out of her hand and settled in her Husband, as her own Goods are; nor, if she die, shall they accrue to the Husband, if no alteration were made in the Property, but shall go to her Executor, or to the next of kin, being Administrator of her Testator, if she have no Executor: and so was it held in the first year of Queen *Mary*. Yea, though for any other Goods which the Wife had in her own right before marrying, the Husband alone, without naming the Wife, may maintain an Action of Trespass: yet touching such Goods as the Wife hath as Executor, the Action must be brought in the names of the Husband and Wife, to the end that the Damage thereby recovered may accrue to her as Executor in lieu of the Goods. So also must the Replevin for those Goods be in both their names. But although the Husband be thus named with the Wife, yet principally is it the Suit of the Wife: and therefore in such Actions, or in Debts by Husband and Wife, she being Executor, if it come to Trial by Jury, the Husband being an Alien, yet shall he not

*M. 31 El. in  
com. ba. If  
the Husband  
be to avow,  
it must be in  
the right of  
his Wife,  
Executor, or  
Administrator.  
Man-  
field's Case.  
Doctor Fu-  
lier his Case.*

have

the Trial per medietatem linguae, or alie-  
genarum, that is, by half Aliens, as in  
other cases where an Alien is party to a  
it is to be had. And where to a Wife  
concede Executor power is given to sell  
land of the Testator's, she may sell to  
her own Husband, as was resolved in the  
Anne of K. Henry the seventh, where the  
coffeees(it being Land settled in use)were 10 H.7.20.  
committed to the Fleet, for that they  
ould not execute an Estate to the Hus-  
band according to the Wife's State. But  
this I much marvel, since the Law in-  
tends the Wife so under the Husband's  
command and subjection, that it holds  
ot her disposition of Land to him by Will  
ee, nor therefore of force; and how  
all this then be conceived to be but a  
artial Sale? Yet *volenti non fit injuria*,  
nd he that will put such power into the  
ands of a Woman under Coverture, doth  
n a manner subject it voluntarily to the  
Husband's will. And it hath been held by  
ome, that even an Infant's or Feme-co-  
vert's Conveyance in such case of necessi-  
y should stand firm and unavoidable, be-  
cause of the Condition express or implied,  
that the State should be void if no  
such Conveyance made.

Bro. Just.  
*Cui in vita*  
15. She may  
sell to any  
other, but  
not to him.

Fenner Just.  
*in ba. reg.*  
Pasc. 37 El.  
& 34 E. 3.  
Bro. *cui in*  
*vita 15.* No  
prejudice to  
them, that it  
be good,

## CHAP. XVIII.

*Touching Infants, and their making or  
ing made Executors.*

BEING now to consider of disabil by Age, for want of years in person making or being made Executors ; us first take view of the several Ages men and women, to several purposes material in the Law, Judgment, and Respect. And first, touching a Woman

35 H.6.41.b. Wangford in *Henry* the sixth his tit shews, and other Books approve, th she hath six several Ages respected in ar by the Law. As first, the Age of 7 year for her Father to have Aid of his Tenan 2. to marry her. Next, nine years, to deser Dower, that is, that in case she be of th Age at the time of her Husband's deat she shall be endowed : but not if she b any thing under those years ; the Law being Physically informed , that a Wo man at those years may conceive a chil but not under them. But of somewha different opinion was, as it seems, the Par

18 Eliz. c.7. liament in the late Queen's time, when i was made Felony to have unlawfull carna knowledge of any Woman-child under the age

e of ten years, it being then conceived, I think, that no such could consent. The Age of 12 years is a Woman's time assenting or disassenting to Marriage more tender years had. For so it appears by divers Books ; although Mr. *Middleton* have here no distinction between male and female. The age of 14 years is Voman's time to be in Wardship, or not; as if she be any thing above those years the time of her Ancestor's death, she capeth Wardship. The Age of sixteen years is her time of coming out of Wardship, being once fallen under it : for although had she been full fourteen , she had escaped it ; yet not so being at the time of her Ancestor's death, her Wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full Age of a Woman, whereby she is enabled firmly and unavoidably to make Grants or Conveyances, is 21 years, as well as for the Male ; before which time, be it that she being sole make a Feoffment or other Conveyance, or being married alien her Land by Fine, and her Husband of full age joyn with her, yet is it infirm and avoidable.

Now of the Male, or Man , the first Age material, and settledly resolved on, is

is twelve years; for at that time each Male is at the Leet, to swear his Fidel to the King. This Women doe not, and therefore are they never said to be outlawed, but to be waved, because they have not this admittance into the Law which Males have. This hath been, as I thinke, the ground of that speech, that *Women are lawless Creatures.*

2.

The second Age of Males is 14 years accounted by the Law the Age of Discretion especially material to two purposes viz. First, that if one under that Age commit an act amounting to Felony, yet is he to stand free from the Attainder and Punishment incident to a Felon. Regularly it is thus, but, *Non est regulaque fall.* One of much less years, having attained ripeness of Discretion and discerning, shall incur the like Attainder as one of full age: as was resolved in the time of King *Henry* the seventh touching an Infant but of the age of nine years, who having killed another Boy of the like Age with his knife, and then hiding the slain Boy, and excusing the bloud found upon him by saying that his nose had bled; it was held by the Judges, that he was to be hanged as a Felon,

son, his such Non-age notwithstanding. The other point, touching which is Age of fourteen years is especially material, is touching an Heir of Lands by Socage: for in case such Heir be under that Age, he is to be in Ward to the next kin; but if he be of that Age, he is not to be in Ward at all, for that the Law algeth him to be of Discretion at those years: and therefore a Gardian in Socage being in effect but a Bailiff accountable, he hath no need of such an one, other then such as himself shall use.

The third Age in and touching Males material is fifteen years: for every Lord of a Mannor, or one having Free-holders in Socage or by Knight's Service, when his eldest Son cometh to that age, sc. fifteen years, is to have of them aid for the making of him a Knight, towards which every one holding by a hole Knight's Fee is to pay twenty shillings, and so ratably for more, more, and less, less; and each holding twenty pound Land in Socage is to pay the like sum, and so ratably for more or less.

The fourth Age of Males is the full 4.  
age

age of 21 years, which maketh him free from Wardship, having Lands held by Knight's service descended unto him; and also makes him able to alien Lands or Goods, makes firm his Bonds, Statutes, Recognizances, &c. For although at fourteen the Law judge him of Discretion, yet doth it not hold him fully ripe till one and twenty.

5.

*Oblitum.*

Another of  
60. to ex-  
empt from  
being com-  
pelled to  
serve by the  
Stat. of La-  
bourers.

23 E.3. c. 1.  
W.2. cap. 38.  
13 E.1. No.  
na. Br. 165.

The last Age of Males respected by the Law is seventy years: at which time Sheriffs are to forbear to impannel them in Juries; and in case they do not, such old man may have a Writ to the Sheriff grounded upon the Statute for that purpose made in the time of K. Edw. I. commanding such Sheriff to forbear the impannelling of him, and he may have an Action to recover Dammages upon the Statute. This is called by most a *Writ of Dotage*; a word, perhaps, anciently taken in a good and favourable sense, *pro doti etatis, viz.* a Gift, Priviledge or Exemption allowed to Age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of these several Ages, let us now see wherein and how Age is material touching them who are to make or to be made

made Executors, and what Age is required hereabout. Master *Perkins* saith, that one of four years old may make a Will, and consequently Executors; and his reasons, because the Executors being to account before the Ordinary, it cannot be intended but that the Goods shall be distributed for the good of his Soul. He speaks as if he only made an Executor by his Will, but did not bequeath any thing, but left all to the Executor's Conscience and Discretion; which is not usual, though feasible, as before I have shewed, or said at least. But admit it were so, and no Bequest at all contained in the Will; yet since at that Age an Infant hath no Discretion to elect a fit person to distribute his Goods, Money and other things, nor to make continuation of an Executorship to another, to whom perhaps the Infant was Executor; I cannot see that his Will should be of any force: but if he be of the age of 14 years, being the Age of Discretion in the Judgment of Law, then I should hold him able to make a Will, although yet he be an Infant till 21 years, and can make no Gift of Land nor Goods which shall be of force. And *Babington*, Chief Justice, to other purpose, makes

*Desires f.*  
97. No good  
reason, for  
one may  
make an All  
Account,  
specially  
having a  
Child's di-  
rection for  
his doings.

g H.S.f.c.

like distinction between an Infant of such tender years , and one come to the year of Discretion. So also, as before we shewed, is it in the case of Felony. And that way also sounds that which *Hanck* says in *Henry* the fourth his time, *viz.* that an Infant of 18 years old may be a Disseisor ; as implying, that his years may be so tender, that, as *Candish* saith of an Infant in *Edward* the third his time , he is not to be intended able to know or discern between good and evil : methinks therefore he should be at the least of the age of Discretion, *viz.* 14 years, who should be able to make a Will, and consequently an Executor. And the Custom for an Infant of fifteen years old to bequeath by Will hath, as to me it seems , affinity with this Opinion, though there the Case was of Land in a Borough devisable by Custom. And that way reflecteth the Case in the time of King *Henry* the sixth, where it was said, that an Infant under fifteen years of age should not wage his Law , *viz.* take an Oath to acquit himself of a Debt, or excuse his Default in an Action real. And farther reason of this Opinion will arise out of the consideration of an Infant made an Executor.

Now

Now touching an Infant made Executor, how young soever he be, the making of him so is not void; but yet the Execution of the Will, which is the performance of the office of Executor, shall not be committed to him till he come to the age of seventeen years; by the Law Spiritual, and till then (for that he is not able to doe the part of an Executor,) Administration is to be committed to some other: yet if it be a Woman Infant who is so made Executrix, in case she be married to a man of seventeen years old or more, now is it as if she were of that age, and her Husband shall have the Execution of the Will; and if Administration were before committed during the Minority of the Woman, it shall now cease, as is said in *Prince's Case*. Yet I do a little marvel at these Opinions, considering that these things are managed in the Spiritual Court, and by that Law; and it intermeddles not with the Husband in the Wife's Case: now by that Law, and not our Common Law, comes in this limit of 17 years. And I have seen it otherwise reported in and touching the last Point:

Co. lib. §.  
fol. 29. p.

M. 41 &  
42 Eliz.

Farther touching Infants Executors,  
X 2 and

*Co. 15. f. 29.*  
But pay-  
ment is to  
be made to  
the Execu-  
tor, and not  
to the Ad-  
ministrator,  
*M. 15 & 16*  
*E. in com.*  
*b. Rep. 67.*  
*Co. li. 5.*  
*fol. 29.*

*Co. lib. 6.*  
*fol. 67.*

and under the age of seventeen years, this is to be noted, *viz.* that such an one is not able as an Executor to assent to a Legacy, so as it may by virtue thereof settle in the Legatee. Also if Administration be during such Minority committed with special words of Restraint or limitation, *viz.* that it is done to the use or profit of the Infant-Executor, then no Sale of Lease or Goods, or assent to Legacy, by such Administrator, will bind or prejudice the Infant-Executor; but otherwise, perhaps, if the Administration during the Minority be committed generally. And if the Testator himself, making an Infant Executor, doth also appoint another to be his Executor during his Nonage, expressing it to be onely for the benefit and behoof of the Infant-Executor; I doubt whether this temporary Executor stand any whit restrained from what pertains to the power of an absolute Executor: for there may be, perhaps, difference between him to whom the Owner of the Goods commits the government of them, though but for a time and in special manner, and an Administrator so specially made by the Ordinary, another being presently by the will of the Owner or Testator to have

ave the Administration, in whom for a  
me legal defect is found. But now let  
s pass over this age of seventeen, and  
onsider of the Infant between that time  
f his being admitted to take upon him  
he Executorship, and his accomplish-  
ment of his full Age of one and twenty.  
First, then, suppose that he doth release a  
Debt due to his Testator; whether shall  
this be good to bind him, and to discharge  
the Debtor, as well as if the Executor had  
been of full Age, he now having proved  
the Will, and being by the Law Spiritual  
approved an able Executor? And this  
Point coming in question in *Russel's Case*  
H. 26 Eliz.  
in the late Queen's time, consideration  
was had of divers good Reasons for en-  
abling of this Release; as that an Exe-  
cutor represents the person of his Testa-  
tor, and in his right and power doth these  
acts, and not in his own, and therefore  
his Infancy, which is a state or condition  
of his own natural person, shall no more  
disable him then it doth the King, a  
Mayor, or other Head of a Corporation.  
Also divers Books were found to run that  
way, as well in the case of an Infant, as  
of a Feme-covert. But upon great  
deliberation in the *King's Bench*, and

16 H. 6. Re.45. 21 E.13. 24.

upon conference had with the Lord *Anderson, Manwood*, and other Justices, it was resolved and adjudged, that the Release of an Infant Executor, without payment of the Debt and Duty, would not bind or bar him. 1. For that if it should, it would be a Wasting or devafting of the Goods of his Testator, and so would charge his own Goods. 2. It would be a wrong, which an Infant could not doe by his Release. 3. It was no pursuit nor performance of the office or duty of an Executor, but the contrary. And upon this Judgment a Writ of Error was brought in the *Exchequer-Chamber*, where it was agreed by all, that the Release was not effectual nor binding, so as this Point now had the Resolution of all the Judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the Infant-Executor might have made a good Acquittance and Discharge; and indeed, Payment it self, if proved, brings Discharge enough, except in the case of a single Bill. Note, that the principal Case adjudged was not a Release of any Debt or Duty by Specialty, but of Trespass in conversion of Goods found or taken in the Testator's life-time. But *posito* that this

Infant

Co. lib. 5.  
fol. 27.

Infant had assented to a Legacy, whether will this bind him or not? For in the Case of *Russel* it is said , that all things which an Infant doth according to the Office and duty of an Executor will stand firm ; now it is part of his Office to pay and execute Legacies. Yet since this act amounts to a Vastation or wasting of the Testator's Goods as well as the other , in case there remain not Goods sufficient for payment of the Debts, and consequently here, as well as in the other Case, the Infant's own Goods would become liable to his Testator's Debts ; I doubt , and incline, that it is not, nor can stand effectual : for except in the other we admit a want, or possibility of want , of *Assets* or Goods, the Release could neither hurt the Infant himself,nor do wrong to any other ; and that admitted, this case is of like prejudice. Yet if these *Assets* should be void, so also would be his payment of Legacies : and how then were he an able Executor at the age of seventeen years, to sue and to be sued for Debts and Legacies ? And if upon Suit it cannot be shewed that Debts will take up all, or disable the payment, then, haply , he may be forced to pay. *Quare*, notwithstanding , whether

these acts ( though voluntary ) stand no good upon *Bene esse*, or conditionally, viz if there be besides Goods sufficient, &c. so that else the non-aged Executor may have an Action of Accompt for the mony by him paid to the Legatee, and also avoid his Assent, where that is onely needful. But doubtless, neither the Assent of such Executor before his age of 17, nor any payment of a Debt to him, could be good, although such acts to or by another Executor before the proving of the Will would stand firm and good; for this Infant wants not onely proving, but also ability to prove, his Testator's Will; yea, the Will stands suspended, and the Testator as it were intestate, whilst the Administration stands in force, so as during that time nothing can be done by any as Executor: and therefore there is great difference between the Cases. What if payment of a Legacy be made to an Infant, can he make a sufficient Acquittance? This, I confess, is besides the Point in hand; yet because it concerns Infants and Executors, (though not Infant-Executors) it is not amiss here to cast some thoughts and words upon the Point, for that it many times perplexeth both Exec. and Legatees. First, therefore, in case the Infant be of the years

years of Discretion, *viz.* 14, I hold it clear, that any Payment to him made will stand good, for that the Law at that age holds him able to govern and manage his own Lands held in Socage, and consequently to receive the Rents thereof: wherefore, whether he who makes such payment have any Acquittance or not, if he have proof of the payment, he is well enough acquitted from any second payment; and if without payment he get an Acquittance, it will not suffice, the Infancy of him who makes the Acquittance considered. Besides, if the Acquittance be, as most usually they are, but signed onely with the name of the maker, and not sealed, it is onely an evidence or proof of payment, and no pleadable Acquittance, because no Deed; so as it nothing differs from proof by Witnesses, save that it is not mortal, as they. But now if the Infant be under the years of Discretion, what shal we say to a payment to him, specially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be used by the Exec. generally; and the surest way is, if he fear to keep it in any respects, to pay it into the Court where it is recoverable, *viz.* where the Will was proved: yet the Case so may be, as that this pay-

Notes of  
Receipts,  
called Ac-  
quittances.

*Quere.*

payment may not be at all safe for the Executor. As put the case that he entred into Bond or Statute, to pay all Legacies by such a day to the several Legatees ; here, I think, the payment into the Court Spiritual sufficeth not , for that must make the Receipt to be with some Charge, which is in some kind an Abatement : there I think therefore, legally to secure the Executor , the payment must be to or in the presence of the Guardian, because of No-riture, *viz.* him or her who hath ( though not as Guardian in respect of Lands ) the Custody or education of the Infant ; for otherwise, to pay it into the hands of such a tender Infant, separate from any Gover-nour or Guardian, were to expose it to loss, both for that he is not able to count the sum, and for that he , yet not being come to discerning years, were like, with *Aſop's Cock*, to part with Pearls or Coin for Plums and Trifles of no value. But in case no Bond nor other collateral Penalty lie upon the Executor, or in case the Bond or Statute be onely to perform the Will generally , which nothing alters the course of payment which by the Will the Law laies upon Executors; then is not the Executor put to any such payment,

nor

nor need pay without demand and Acquittance, as in case of payment upon a single Bill, or of Rent-seck, where no Distress can be taken, nor other Penalty incurred. Yet in that case, if Demand be, and Acquittance ready to be givēn, let the Executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the Acquittance in respect of Nonage; for, as I have said, proof by Witnesses may supply a nullity of Acquittance, and much more the Weakness or Imbecility: payment according to the Testator's appointment being the matter which acquitteth the payer, and this the Executor may have testified under the hands of divers Witnesses expressing circumstances, so as all dying, he may continue safe from second payment as well as if an Acquittance had, the Witnesses whereunto are subject to mortality as well as the other. But herein Courts of Equity do often interpose helpfully for them who seek not evasion from payment, but onely security in paying. And of Infant-Executors, and, by occasion thereof, of Infancy in Legators or Legatees, thus much.

## CHAP. XIX.

*Of Legacies.*

**A**lthough these be not recoverable at and by the Common Law, but most naturally at and by the Law Ecclesiastical; yet by Suits in Courts of Equity, as the *Chancery* and *Court of Requests*, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occasions so to doe. We will therefore consider thereabout these parts or Points, some whereof have been in part before touched upon other occasions.

1. Whether any Legacy in certain, and lying in prender, may be taken or had, without the Executor's assent, by the Legatee, or him to whom it is bequeathed.
2. When an Executor can or safely may pay, deliver, or assent to a Legacy.
3. Whether one Executor alone may doe it; and what if the Executor be an Infant, or Woman-covert.
4. What shall amount to an Assent of the Execu-

Executor, and what to Disassent or Dis-  
ablement of assent.

How a Lease or Chattel real may be  
given to one for a time, with remainder  
to another; how not.

Where an Assent to the first, or one  
part of the Bequest, shall imply or amount  
to an Assent for the residue.

Of the manner of Assents, and therein  
of Assents conditional.

What manner of Interest he in the Re-  
mainder of a Lease after the death of an-  
other hath during the life of that other;  
and whether he may dispose of it during  
that time, and how.

Whether this Remainder can be defeat-  
ed by any act of the Devisee for life, or by  
the death of him in Remainder first.

By what acts or accidents a Legacy  
may be forfeited or lost, and therein of  
Revocation, death before, &c.

Whether the Executor's Assent shall  
have relation to the Testator's death, and  
shall make good a Grant before made by  
the Legatee.

As for the first, we have before shewed  
the Assent of the Executor to be necessa-  
ry before any Legacy can be had, for that  
Debts are first to be payd, & that the Exec.

5.

6.

7.

8.

9.

10.

11.

If the Exec.  
give it to  
another, the  
Legatee  
hath no re-  
medy at the  
Common  
Law, per  
Prisot,  
57 H.6.30;

is

is to look to at his peril. But hereto addeth  
a little out of M. *Swinborne*, a learned Ci-  
vilian, who saith, that in case any Goods  
be in the hands or custody of *F S*, and the  
Owner doth bequeath them to him, then  
may he keep or retain them against the  
will of the Executor, so as there be other  
sufficient Goods in the hands of the Exe-  
cutor for payment of all Debts: but though  
thus (as it seems) it would stand in the  
Ecclesiastical Law, yet for that no Pro-  
perty is transferred to the Legatee with-  
out the Executor's assent, therefore, doubt-  
less, the Executor may at the Common  
Law recover the thing withheld, or Dam-  
ages to the value, against the Legatee  
detaining it. Another Case there is  
wherein, as the learned Civilian saith, the  
Legatee may take to him the thing be-  
queathed lying in prender, *viz.* Horse,  
other Beast, or piece of Plate, or other like  
thing known, and in being; and that is,  
where the Testator doth expressly so ap-  
point by his Will. But herein, doubtless, the  
Common Law, at and by which Debts are  
recoverable against Executors, will oppose  
the Law Spiritual: for else by such ap-  
pointment the Testator might cause all his  
Goods to be taken by Legatees, and that  
none

none should remain to pay Debts. Yet if there be other Goods besides sufficient for payment of Debts ; then indeed I see not how the Executor can hinder such taking, without violating his Oath taken for performance of the Will. If any say, that it is also a breach of Oath in the other case ; I say, he observeth not that there that clause in the Will, being against the Law, is void, and, consequently, there is a Nullity upon it, and it is as if no such thing were in the Will , and so the Oath extends not to it. And as a Chattel shall not be transferred to a Stranger without the Executor's assent ; so if the Devise be to the Executor himself till he elect to take a Legatee , it shall be to him as Executor , as appears by the strain and Argument of two Cases in *Plowd.* Comment. and more lately in the *King's Bench* , the Point being divers dayes argued, was at last so resolved by three Judges against one. And the reason of Coke at the Bar was very good , for here the Executor sustains two persons, viz. an Executor and Legatee , and so all one as where the Request is to another ; for, *Quando duo jura concurrent in una persona, æquum est ut si essent in diversis.* As

Welchden &  
Elkington,  
Paramour &  
Yardley,  
Portman &  
Simmes Case.  
Trin. 37 Elz.  
All but  
Gawdy so  
agreed.

As for the second Point, it may have these two parts : First, when the Executor is able to give such assent to a Legacy; and secondly, when he may doe it with safety. As for the first, he is able before Probate of the Will to assent unto the Execution of a Legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty years: but if he be under seventeen years, so as he is not able to take upon him the office of an Executor, and therefore Administration is during that time to be committed to some other; here his Assent is not of force or effectual, as we find, in *Prince's Case*, to have been held in the Case of *Pigot and Gascoin*. As for the second part till all Debts be payd, the Executor may not safely consent to put the Legatee into the Lease or Chattel devised; no more then he may pay money bequeathed, if there be not sufficient also to pay all Debts. Of these things more is said elsewhere. Yet because the Reader, or he that desires direction in these Points, will look for them under this Title, I thought not good here to be altogether silent touching them.

As for the third Point, viz: Whether the

*El. Dyer*  
367.

*Co. L. 3. f. 29.*

the Assent of one Executor, where there  
be many, be sufficient; I see not how to  
doubt: since any one Executor may give  
away any Goods of the Testator's, or re-  
lease any Debts due to him; therefore  
much more assent; which is no more or  
greater work, in effect, than an Attorn-  
ment of one Lessee upon a Grant of a Re-  
version. And if there want to pay Debts,  
he only who assented shall answer for it  
of his own Goods, and not his Compa-  
nions. But if this Executor be either un-  
der the age of seventeen years, or under  
Coverture, *viz.* a Woman married, such is  
not able to give a good Assent to bind  
the others, nor themselves, for then  
thereby the Infant might draw a Debt up-  
on himself, and the Wife upon her Hus-  
band, by assenting to or paying of a Lega-  
cy, there not being sufficient Goods to pay  
all Debts. But the Husband's Assent is suf-  
ficient where the Wife is Executor; for  
his act, whom she hath chosen to be her  
Head, may prejudice as well her as him-  
self; yea, though she were within Age, yet  
he being of full Age, his Assent will stand  
good. But if he or another Executor in  
his own right be above 17 years of age,  
or else under 21, I doubt whether now

6 H.7.5. If  
the Bequest  
be to one of  
the Execu-  
tors, he may  
take it with-  
out assent of  
his Compa-  
nions; yet if  
a Debt, his  
Companion  
may release.  
H.48E.4.14,  
15. So held  
where but  
one of the  
Executors  
during Non-  
age assented,  
in the Case  
of Rhetorick  
and Chappels  
H. 9 Jacob.  
Rot. 87. in  
ba. reg. C.

his Assent will be sufficient, at least except the case be put, that there be *Assent* sufficient, which perhaps there may be material though not in the other. See more hereof after in the Title of Women-covert and Infants Executors.

As to the fourth Point : first, there may be an Assent and Election implied as well as express : for if in the Devise or Bequest the Legatee be appointed to doe some act as in respect of the Legacy, and the Executor doth accept the performance thereof, this amounteth to an Assent. So if the Devise be to an Executor for the Education of some Children, which he doth accordingly educate, this makes an Election to have the thing by way of Legacy, and not as Executor, as appears by the Case of *Paramour and Yardley*, *Pound*. 543. So if an Horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to goe and buy the Horse of the Legatee, or if the Executor himself offer money to the Legatee for the Horse; this implieth an Assent that it should be the Legatee's by the Will: and so was it held in the Case between *Low and Carter*, where the Devisee of a Term did grant it to the Executor;

See Co. Lib.  
Int. 150. the  
Executor  
being Devi-  
see for life,  
said the o-  
ther should  
have it after  
her death,  
and he en-  
tered, and  
took Admi-  
nistration; she  
dying inter-  
state, yet  
held *Assent*  
in him.

This M. 19  
H.7. Rot.  
218. See Li.  
Int. 321. One  
gave the  
third part of  
his Goods to  
*A*, with  
whom the  
Executor  
accounted  
for the A-  
mount, and  
*A* sued for  
that sum in  
Debt; but no  
Judgment  
upon De-  
murrer. Tr.  
37 El. in ba.  
*r.* Where  
Bequests to  
the Execu-  
tor himself,

utor, and this Acceptance of a Grant from him was held to imply the Executor's Assent, that it should be his to grant. But I see not well how that should be Law which in the latter part of the L. *Dyer* is found, *viz.* Where a Term was devised to *J. S.*, and he was made Executor, and after the death of the Testator entered and occupied the Lands a whole year without proving the Will, that this was an Election to have it as Devisee, and not as Executor. For, first, he had good right to the Term as Executor before Probate, and so might clearly in that right have taken the Profits, although it had not been devised or bequeathed to him; and that before any Will proved. Secondly, he could not by right have it as Legatee, without Assent of himself or some other as Executor. Therefore this general Acceptation can determine no Election, as elsewhere is held. As for Dis-assent or Disablement to assent: As if the Executor do once declare his Assent that the Legatee shall have his Legacy, he may then enter into it or take it, notwithstanding the Executor's Countermand or revocation of his Assent after; so, on the other side, I think, if he fully and expressly deny that the Legacy shall take effect,

*Tr. by Eliz.*  
If he by Will  
bequeath it  
to *J. S.*, this  
an Election  
to have it as  
Legatee.

he cannot after make a good Assent thereunto, for that Election once made must stand peremptory; be it Refusal etc assent, or Assent. Yet *Quare* of this, for that the Refusal to assent may be checked by Sentence or Decree in the Spiritual Court or Court of Equity, and so an Assent be inforced. But if the power of Assenting be legally lost by the means aforesaid, *viz.* disabled, I see not how any legal Interest can be transferred by that compelled Assent, howsoever decreed.

And what is said of a Legacy bequeathed to another, the same may be understood in case where the Bequest is to the Executor himself, and he makes his Election to have it as Legatee, or as Executor. But if where an Horse is bequeathed to A, the Executor after the Testator's death doth ride the Horse, or use him in the Coach or in the Plough, I do not take this to be any such Disagreement to the Execution of the Legacy, has that the Executor cannot after assent to the Legatee's having thereof, no more (though it be somewhat more); then where a Drinking-cup is bequeathed, and the Executor after the Testator's death doth use it to drink in: nay, if a Lease of Land be bequeathed to A, and

So if the  
Executor  
take a new  
Lease, his  
Assent after  
is void.

Tr. 37 Eliz.  
Carter's  
Case. 19 El.  
Dy. 359.

*It is to be  
noted that  
as it evaneth  
so it evaneth*

and the Executor continueth the Depar-  
turing of the Testator's Cattel therein ;  
yet is not this any Disagreement to the  
Execution of the Legacy. But if this Lease-  
land were let out by the Testator from year  
to year ; and the Executor dischargeth  
the Tenant, and taketh it into his hands  
at the year's end ; this I conceive to be a  
Dis-assent to the Legacy : and so also per-  
haps may his taking or distraining for a  
any Rent thereupon due after the Testator's  
death. Yet am I not resolute that the Dis-  
assent is so peremptory and unchangeable  
as the Assent, rememb'reng the Case in K.  
*Henry the eighth* his time, where a Term  
being granted by a Lefsee conditionally,  
so as the Assent of the Lessor could be had  
by such a day ; though the Lessor's Assent  
were at one time denied, yet might it be  
yielded at another, so as it were at any  
time before the day. But yet there it was  
held, that if no time of Assent were limi-  
ted, then one express Denial or refusal  
would be peremptory, so as the Refusal  
were expressed to the party to whom the  
Assent was to be given ; otherwise, if it  
were but in speech to or amongst Stran-  
gers. This and the former Case *19 Eliz.*  
give the best light to this Point that on.

14 H. 8. 23.

Dy. 359. Af-  
ter choice  
once made,  
no variati-

I remember. Now for Disablement to assent, it was held in the forementioned case of *Law and Carter*, that where a Term is bequeathed to *A*, and after the Testator's death the Executor takes a new Lease of the same Land for more years in possession; or to begin presently; now by this was the Term left by the Testator surrendered and drowned, so as it could not pass to *A* by the Executor's Assent after.

As to the fifth Point, *viz.* In what manner a Lease for years or other Chatte real may be bequeathed to one for a time with Remainder to another; it hath been heretofore much doubted, when a Lease for years was bequeathed to one for life; or for so many years as he should live, whether the limiting of a Remainder thereoftet his decease were of any validity in Law or not. And this Doubt had this ground: Any State for life in the judgment of Law is greater then any Term for years: therefore when a Termer hath by his Will given his Term or his House or Land which he so holdeth for years to one for life, or for so many years as he shall live; this Testator and Devisor hath not in the judgment of the

he Law any Estate remaining in him; and therefore it was thought very hard for him to give or limit a Remainder to another. But after many arguings and debatings, it was in the late Queen's time resolved, that such a Remainder was good; and that if the first Devisee died before the Term expired, that then he to whom the Remainder was limited might enter and enjoy the residue of the Term. As for the giving of part of the years to one, and the residue to the other; *viz.* if the Term being twenty years, the Lessee bequeathed ten thereof to his Wife, and the Remainder to his Daughter; of this no doubt ever was but that it was good: for that after the first State limited, there remained a farther Term, *viz.* ten years more, in the Devisor, whereof he had power to dispose; whereas in the other Case, after the Term limited to one for life, there remained but a possibility that this life should not take up the whole Term. But now, put we the case a third way, *viz.* that the Termor deviseth or bequeatheth the thing in Lease to one Child in tail, with Remainder to another, and dieth, and the first entreth and dieth without issue; now

Plow. Com.  
520 & 522.

whether shall the next in Remainder or the Executor of him so dying have the Term residue? And this Case came in question and was adjudged about the middle of King John his Reign in the Exchequer : for there, Master *Hamond* holding by Lease for years from the Crown the Manor of *Akers* in Kent, devised the same by his Will to *Alexander Hamond*, his eldest Son, and the Heirs-males of his body, with Remainder to *Ralph Hamond*, another Son, in like manner, and the like Remainder to *Thomas Hamond*, and made the said *Alexander* Executor, who after his Father's decease elected to take as Legatee, and after *Ralph Hamond* died, leaving Issue male, and making his Wife Executrix : *Alexander*, not having Issue male, granted the whole Term by Deed to *B* and *C* for the behoof of himself and his Wife during their lives ; and after to the use of his youngest Daughter, whom Sir *Robert Lewkenor* married. Then *Alexander* dying without Issue male, the Wife and Executrix of *Ralph Hamond* entred, claiming the Term, and being kept out, sealed a Lease ; whereupon an *Eject. firmæ* was brought, and a Jury appearing at the Bar in the Exchequer, found a special Verdict

Both *Alexander* and *Ralph* were Executors; but that makes no difference.

list in effect *ut supra*. And in argument of this Case, first the main Question was, whether the Case were all one in Law with the former, where a Term was devised to one for life, with Remainder over, so as by the death of *Alexander Hamond* without Issue male the Term should goe to the next in Remainder, as in the other Case, by the death of the Devisee for life, dying within the Term, it should doe. And on the Plaintiff's part it was urged to be all one, so that by virtue of the Bequests *supra*, *Alexander* had an Estate to him and his Executors onely so long as there should be Heirs-males of his body; and he dying without such Issue, the Term remained to the Executors of *Ralph*, who had the Remainder in like manner, and left Issue male, which still lived, & so that State of *Ralph* yet had continuance. For it was admitted by the Counsel on *that* side, that the Term could not goe to the Issue male of *Ralph* according to the words and intent of the Will, since it was impossible to make a Term to descend without an Act of Parliament. This therefore they said the Law should work, which was nearest to the intent, *viz.* that after *Alexander's* death it should

goe

goe first to his Executors and Assigns, so long as Issue male of his body doth continue; and for want of such Issue, then to *Ralph*, his Executors and Assigns, so long as his Issue male should last: and therefore in this case, the Issue male of *Alexander* failing, the Executor of *Ralph*, whose Issue male faileth not, should enjoy the Term; and so Judgment ought to be given for the Plaintiff being Lessee of that Executor. On the other side it was said by the Defendant's Counsel, that this Case differeth much from the other Case, where the Term or Land held by Lease is given but for life to the first, with Remainder to another; which Case, as having been often resolved, was clearly admitted to be good Law; for in that Case the intent of the Testator might and did take effect. But in this Case, if the Land should goe to the Executors and Assigns of *Ralph Hamond*, it must goe against the intent of the Testator, whose mind and will was, as it appears by his word, that it should goe onely to the Issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect,

there-

herefore it must be void, and so all the words of Heirs-male standing void, the Will is to be construed as a sole and absolute Gift and Bequest to the said *Alex.* and consequently the Term must goe to his Executors and Assigns. And for this Point, resemblance was made to a Case resolved in the *King's Bench*; where a Lease was made by Indenture to *A, Habend.* to *A, B and C* for their lives: now because *B* and *C* could take nothing, it was resolved that *A* should not have it for their lives, but for his own onely. This Case was said to come very close in reason to the Case in question: For as here the intent of the Lease was that *B* and *C* should be estated for their lives, and, since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named, and their Lives shall not stand as a measure for the Estate of *A*; so in the other Case the intent of the Will being, that the Lease or Land leased should goe to the Heirs-males of the body, first of *Alexander*, and after of *Ralph*, since this cannot be, therefore the words and name of Heirs-males should stand for a mere Blank and Cypher, and not to mea-

Windsmore  
and Holford  
*vel Holbord*  
M. 28 & 29  
El. argued,  
and Tr. 29  
El. adjudg.

measure out any State to the said *Alexander* and *Ralph*, and their Executors and As-  
signs. Also it was said on the Defendant's  
part, that an Estate for life in the judg-  
ment of Law is of so short and uncertain  
continuance, that if *A* make a Lease to  
*B* for his life, and after makes a Lease of  
the same Land to *C* for years, now shall  
not this latter Lease be void absolutely  
for any part of the Term, but shall stand  
in expectancy of the death of *B*, and,  
as soon as he dieth, shall take effect im-  
mediately : whereas if the Lease to *B*  
had been for ten years, or any like Term,  
then the Lease to *C* should have been  
void for so many years of his Term. Thus  
it appears that a State for life is very  
momentary in the judgment of Law, and  
not reputed of any certain continuance  
so much as for a day. But it is other-  
wise of an Estate-tail, so as if *A*, ha-  
ving given Land to *B* in tail, doth after  
(without Indenture which makes an Esto-  
ple) make a Lease to *C* for 21 years, and  
then *B* dieth without Issue during the  
Term, yet shall not the Lease take effect,  
because it was utterly void at the first  
making. For an Estate-tail, being a  
State of Inheritance, may in the intend-  
ment

nent and Judgment of Law have continuance for ever, as appears both by the Case of *Adams* and *Lambert*, where it is held within the Statute of Chanceries, which speaks of Gifts to have continuance for ever. Therefore a Reversion upon an Estate-tail is no *Assets*, nor giveth cause of receipt; otherwise in all these Cases it is touching a Reversion expectant upon a State for life. Again, it was said by the Defendant's Counsel, that an Estate may be limited to *A* and his Heirs during the life of *B*, with Remainder to *C*, as in *Chudley's Case*, was resolved: but if Land be given to *A* and his Heirs so long as *B* shall have Heirs of his body or Heirs-males, with Remainder over to *C*, this Remainder is utterly void. So as there is in the judgment of Law a great difference between the largeness and continuance of an Estate-tail, and of an Estate for life. And if (which is worth the observing) a Fee-simple cannot afford a Remainder to be drawn out of it after such a Gift to one and his Heirs, during the continuance of an Estate-tail, or of the measure thereof; much lesse can a Term yield such large thongs to be cut out of it, as a Remainder after an Estate

as H. Dy:  
fol. 7.

Estate to one so long as he shall have Heir of his body, or Heirs-males; which is all one. And in this Case the Remainder was held void by *Baldwin* and *Shelly* though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Farther it was said, that if such a Conveyance by Will should stand good, it would raise Perpetuity, not to be cut off by any Recovery.

But whereas the Case of *Hamond* hath been related before, so as by way of admittance it was argued as a Gift and Bequest to *Alexander Hamond* and the Heirs-males of his body, with Remainder in like manner to *Ralph*; the truth of the Case was, that the words of the Will were onely to *Alexander* and his Heirs-males; (not speaking of his body) and so to *Ralph*; which, as was urged by the Defendant's counsel, made the Case stronger against the Plaintiffs: for admit that the former way *Alexander* should have had but a State determinable upon the continuance of his Issue-males; yet here not so; since the reason why in Wills, such a Devise being made, the Law should supply the words (*of his body*,) is onely to make an Estate-tail to the Issues male;

ccording to the Testator's Intent. Now in this case of a Term for years so bequeathed, no Estate-tail could possibly be, though these words had been in the Will; and therefore the motive to the Law failing, no such supply will be made by the Law, since it would be to no purpose: consequently, here was neither State-tail, nor Issues or Heirs-males of the body, on whose continuance this State of *Alexander* should be determinable. Therefore it was an absolute and total Bequest of the Term to *Alexander* for ever, *viz.* so long as the Term should continue; for as a Bequest to one for ever is as much as a Bequest to him and his Heirs; so a Bequest to one and his Heirs is as much as if it had been to him for ever.

And this Case, after six Arguments on each side at the Bar, (if I much mistake not) was upon argument by the Barons adjudged for the Defendant by the Lord chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who onely heard, as I take it, one Argument on each side, made of purpose in respect of his coming into his place, after the former Arguments) being of the

the contrary Opinion : and the Judgment proceeded upon the Point formerly touched, that, as this Case was, the state of *Alexander* did not end by his death, and remain to the Executor's of *Ralph*. Other Points were stirred, which will be touched upon in other Divisions after, in this Chapter. It will be observed that I do more fully express Reasons and points inforced on the Defendant's part than on the Plaintiff's, wherefore let these two reasons be accepted. First, that I better could relate that than the other, being the first who argued for the Defendant, and hearing little of that which was by others said on either side after, nor hearing the Court's; *b. nec ad hoc conductus, nec pedibus fortis.* Secondly, the labour did lie on the Defendant's part, to prove that this Case differed from the common Case of Devise to one for life, with Remainder to another.

We are now come to the sixth Point, viz. that where House or Land held by Lease, or the Profits thereof, or the Lease or Term it self, which in a Will makes no difference, is bequeathed to *A* for life, or for some part of the Term, with the Remainder to *B*, and the Executor as-

sents

sents that *A* shall enjoy his Bequest, whether this shall enure to *B* also; since without the Executor's Assent no Legacy can take effect. And it hath been resolved that this Assent shall be effectual as well to all the Remainders as to the first Estate: and so, according to former resolutions, it was admitted in *Hamond's Case*, that *Alexander* his Assent to take as Legatee sufficed (if the Bequest had been good) for the Remainder to *Ralph* and others. And the reason of this doubtless is, because here the particular Estate and the Remainder are all but one Estate in Law; they make but one degree in a Writ of Entry, nor shall have but one year and a day to enter for Mortmain. And an Atturment to the Grantee of a Rent or Reversion for life with Remainder over doth enure also to the Remainder, which being Assent hath much affinity to that of the Executor; each tending to perfect the Grant of another man. Now then, whereas it was urged in *Hamond's Case*, that the State limited to *Ralph* should take effect, not as a Remainder, but as a new Estate to commence futurely, viz. when *Alex.* should be dead without Issue male: if it could be admitted to be so, then could

Plow.545.  
6. Co. lib.  
10. f. 47.

not the Assent of the first State to *Alexander* have enured to this, since to *R* in Remainder it worketh as being one State with the first, which reason must fail the other way. This difference between a Remainder and new Estate future brings to my mind the Case of a Rent by way of new Creation, granted by *C* out of Land to *A* for life, or in tail, with Remainder to *B*. In like manner it hath probably been held, although this Limitation to *B* cannot be good by way of Remainder, because *C* had no Estate in the Rent remaining with him when he made the Grant to *A*; yet should it be good by way of a new Grant and Creation to commence futurely. But this doubtless cannot so be but with a difference. For if the Grant were by Indenture between *C* on the one part, and *A* onely on the other part, now *B*, being no party to the Deed, can take nothing by it, except by way of Remainder, but if he were party to the Indenture; or if the Grant were by Deed-poll, to which all men are alike parties, then it haply may enure as a future Grant to *B*. This is not impertinent.

Now as the Executor's Assent to one cannot enure to another, though of the same

same thing , except by way of Remainder ; so neither can it any way where the things are not the same , except in very special cases. As if a Termer bequeath a Rent to *A* ; and the Land it self to *B* , the Executor's Assent that *A* should have the Rent is no Assent that *B* should have the Land : yet I think the Assent that *B* should have the Land doth imply the Assent that *A* should have the Rent. 1. For that the Restraint imposed by the Law against the passing of Chattell by a Will without the Executor's Assent being out of respect to the payment of the Testator's Debts , now if the Land shall pass to *B* , it is no more available to the Testator's Debts than it pass discharged of the Rent , then charged. 2. Since the Gift and Bequest was of the Land charged with the Rent , therefore if this Bequest shall take effect , it shall carry the Land according to the Testator's intent , viz. with this Charge upon it : for what else doth the Executor in this , but assent that the Will of the Testator herein doth stand and take effect ? and consequently *B* must take the Term according to the Will , and not in any different or contrary manner.

Plow. Com.  
521. in Bret  
& Rigden's  
Case. So of  
Common, or  
other profit.

Next we are to consider of the manner of Assents by Executors, which hath some affinity with the fourth Point. But here we shall consider onely of Assents conditional. Now to this purpose we will cast our eyes upon two sorts of Conditions, *viz.* precedent, and subsequent. As for the former, an Executor may to a Legatee absolutely give Assent upon a Condition precedent, as thus : I am content, that if you can get and bring in to me such a Bond wherein the Testator stood bound to *S.*, that then you enter upon the Term, or take the Corn or Cattel to you bequeathed. So of other like Conditions which may precede the Assent : as, If you can get the Assent of my Executor, or, If you will pay the Arrerages of Rent to the Lessor behind at the Testator's death, or, If you will pay the Wages already due to the Servants attending about the Cattel or Corn to you bequeathed. In this case, if the Condition be not performed, there is no Assent, and therefore the conditioning in this manner is good. But if it be on a Condition subsequent, as thus, I do agree that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a Creditor of the Testator ;

tor ; now the Legatee entring into or taking the thing bequeathed, shall not lose it again by failing to perform the Condition afterwards ; for the Executor by his Assent cannot make that Legacy conditional which the Testator gave absolutely, no more then he can make the Bequest to be absolute which the Testator gave conditionally, except by a Release made of the Condition. As in other things, so in this , the Executor's Assent is like to the Atturment of a Lessee, which cannot be upon a Condition subsequent, where the Grant is absolute or without condition, though yet he may to his Atturment prefix a Condition precedent.

In the eighth place we are, touching the Bequest of Leafes or Chattels real , to consider what manner of Interest one to whom a Remainder of a Term after the death of another is limited hath, and whether he may grant the same or dispose thereof during the life of the first. And as to that it is clear that he hath but a possibility of Remainder , for that possibly the whole Term may be spent in the life of the first , to whom during his or her life it is bequeathed : now a meer possibility is not grantable. Therefore was

9 Eliz. Ful-  
ley's Case.

Lampet's  
Case. Co.  
li. 10, sc. 48.

it resolved in the late Queen's time, where he in Remainder granted or sold his State or Interest to another during the time of the first, that this Grant was utterly void, because a Possibility cannot be granted. But whereas some opinion in that Case was delivered, that this Possibility could not be released, no more than granted; it hath since been resolved, that he in the Remainder, by his deed of Grant or Release of the Devisee for life, may make his Estate, which before was determinable by his death, to be now absolute, so as it shall continue to his Executors, Administrators and Assigns, after his death during the whole Term. It may be that what was conceived, in the said Case of *Fulsey*, negatively of the validity of a Release by him in the Remainder, might be meant or perhaps expressed of a Release to him in the Reversion: but surely (methinks) though he could not surrender, yet his Release or Defeasance to him in Reversion or Remainder, having the Freehold or Inheritance, should dissolve or destroy this Term residue after the death of the Devisee for life, so as there the Freehold should be discharged thereof. But *Quæ-*

re, for I have not known this in question. As for the other Point of *Fulsey's Case*, it was in the said latter Case of *Lampet* confirmed and admitted for good Law, *viz.* that this Possibility of Remainder could not be aliened nor conveyed to a Stranger.

Now we are come to the ninth Point, *viz.* to examine whether any act of the Devisee for life can frustrate or defeat him in the Remainder of the Term, and whether the act of God, *viz.* by the death of him in the Remainder before the first Devisee for life, shall defeat it. As to the first, it hath divers times been resolved, that no Grant made by the first man can cut off or defeat the second, though formerly it were held otherwise: but according to the late Resolution was it also held or admitted by all in the said Case of *Hamond*, where was such a Grant. And as this cannot be done by any direct Grant or Alienation, no more can it by an indirect or implied, as by taking of a new Lease, which is a Surrender in Law of the old Lease, no more then by an express Surrender; nor doubtless by Outlawry, whereby the Term of the first Devisee is settled in the Crown. But

Plowd. 320.  
Welchden  
and Elking-  
ton. 10 Eliz.  
Dy. 277.  
19 Eliz. D.  
339. Con. 8  
El.D. 253.  
& 33 H. 8.  
Br. Challes  
23.

if we put the Case farther, of Waste committed by the Tenant for life, or breach of Condition by non payment of the Rent, or otherwise; these for the whole in the latter Case, and for the part wasted in the former, do so destroy the Lease, and put the Reversion *in statu quo prius*, as that all Remainders must needs fail: so of a Feoffment, or other like Forfeiture by Fine: As for the death of him in Remainder, it was urged in the Case of *Hammond*, that since it was but a meer Possibility, if it could not take effect, and become an Estate in the life of him to whom it was limited, it could not settle in his Executor: and to that purpose were cited the Case of the Rector of *Chedington*, and more expressly as resolved in the Point the Case of *Price* and *Aimore*. But the Court resolved, (and found former Resolutions in other Courts that way) that the death of him in Remainder did not hinder, but that it may settle as well in the Executors upon the death of the Devisee, as it should have done in himself, if he had over-lived the first Devisee for life. If the Lessor enter and levy a Fine, and the Devisee for life enters not, nor claims in five years; he in the Remainder

Welchden &  
Elk. *ubi su-*  
*pra.* But  
there the  
Point was  
never que-  
stioned,  
though such  
death was  
there.

der may enter, as having a Right futurely accrued.

In the last place we intermeddled onely with Leases bequeathed, wherein yet is to be understood, that what thereof is spoken is to be extended to and understood of all other Chattels real, as Wardship of Body and Lands, Estates by Extent upon Statutes or Judgments, Terms otherwise then by Lease, in Fairs, Markets, Rents, Annuities, Commons, Advowsons, and other Profits ; yea, one single next Avo-dance of a Church. Now we come to consider of Bequests personal principally, if not onely; *viz.* how such may be forfeited, lost, or revoked. First, then, we will consider of the acts of the Legatee ; secondly, of the acts of God ; thirdly, of the acts of the Testator. The Legatee, as from the Civilians I learn, may forfeit his Legacy by his miscarriage towards the Will : as if he use means to have it concealed and kept from being known, and consequently proved. So if he accuse it of Falsity. So, again, if he deface or destroy the Will. Also, if being by the Will appointed to be Tutor or Educator of a Child, he refuseth so to be. So faith Master *Swinborn* : but *Sylvester Prierius* seems

Of Forfei-ture, Revo-cation and other loss of Legacy.

*Swinb. de te-*  
*stam. 352,*  
*353. Except*  
*as Tutor or*  
*Guardian he*  
*accuse it.*

Sum. Sylv.  
283.

seems to me opposite in that where he saith, *Si legatum fuerit aliquid eâ conditione ut facias aliquid, tale legatum non est conditionale, sed modale;* so as he takes away the force of a Condition from words conditional, whereas the other without words conditional raiseth a Condition implied. Lastly, if the Legatee presume too far upon the strength of the Bequest to him, so as he taketh the thing bequeathed without the consent of the Executor, thus also doth he forfeit his Legacy, saith Master *Swinborn*, unless the Testator did will and appoint he should so doe. The falling into enmity with the Testator will be considered of more fitly, as I take it, among the Acts of the Testator. In the next place, let us see what acts of God shall cause a Legacy not to take effect. First thus, If the Legatee die before the Testator, this Legacy is lost, and his Executor shall not have it. So also, saith Master *Swinborn*, if it be appointed to be paid after the death of the Executor, and the Legatee dieth before the Executor, it is lost. And so also if he die before the Condition performed, saith he. Let us come now to Time of payment, and Death before

De Testam.  
252.De Testam.  
255.

before it. If there be a day certain limited for payment, and the Legatee die before that day, his Executor shall have the Legacy; contrariwise, if the payment were limited to be made when the Legatee should be married: but if it were only expressed to be towards the Marriage of the Legatee, and she die before Marriage, her Executor shall have it, saith *Swinborn*. Now put the case that a Legacy is bequeathed to *B*, to be paid when he shall be five and twenty years old, and *B* dieth before that age; it shall now be payed to the Executor, and that presently, without staying till *B* should have been of that age, saith *Priarius*. Nay, saith *Swinborn*, if the words of the Will be so, viz. when he shall come to such an age, then if he die before, his Executors shall not have it at all: but if the Bequest be general, and farther it is added in the Will, that the Testator would have that Legacy paid the Legatee at such an age, there, though he die before such an age, yet his Executors shall have the summe bequeathed. The difference may seem very nice, yet haply it wants not some probable colour of reason. Now lastly let us come

*Vide Bro.*  
*Devise 27*  
and 45.  
There were  
divers days  
of payment,  
and the De-  
visee died  
before the  
last; his  
Executor  
shall have it.  
14 vel 24 H.  
8. 36 H. 8. &  
3 E. D. 59.  
See this dif-  
ference.

*Sum. Sylv.*  
283. Accor-  
ding hereto,  
*vide Dy. ubi*  
*supra*, per  
majorem opi-  
nionem Ju-  
sticiar.

A&s of the  
Testator.

to

*Sum. Sylv.  
285.*

to the Testator's own act , who clearl hath power to revoke or countermand a ny Legacy, though he revoke not the rest of the Will. And here first of Revocation presumed. If there fall out *graves inimicitiae inter Legantem & Legatarium, Legatum caducum efficitur,* saith the Summist ; *sed non propter leves,* saith he : *& si graves, si tamen redeant ad amicitiam, redintegratur Legatum.* That is, by grievous Enmity after arising, and never reconciled between the Testator and Legatee, the Legacy is dissolved ; otherwise of a light breach or falling out , though it continue untill the death of the Testator. This I conceive to be rather fit for this place, as an act of the Testator, then to be reckoned or registered amongst the acts or Forfeitures of the Legatee ; for that it is not by the Summist made material , or any point of difference, whether the Legatee gave just cause of offence, or that the Testator unjustly conceived displeasure, and so grew into causless enmity. Therefore also do I hold it of the nature of a Revocation implied or presumed ; for that although no Revocation be made, yet since the Testator hath ceased to bear good will to the Legatee, he cannot be intended to will him good,

good, nor consequently to be of the same mind touching the benefiting of him, as he was when he made his Will. Yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case, thus; That where the Testator dieth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the Will, and a Revocation of the amicable Bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he do again peruse it, he yet doth not cross nor expunge that Bequest, here it may be presumed that either his enmity ceased, or that so far as to continue this Bequest, the Charity or other motives inducing him to make it stood unvanished and not extinguished by this breach of former Amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and causing it to be attested by Witnesses, though the Testator live divers years after,

after, doth strongly argue his interit not to continue , that what was done in an extremity should stand as his Will : so, on the contrary, the permitting of a Bequest expressed in a written Will to continue without any crossing, blotting or defacing , may argue, against contrary presumption , the Testator's minde , that it should continue as part of his Will. But now let us consider of more express Revocation, and to that purpose will I relate a late Decree in the *Chancery* , made by the Lord Keeper, according to the opinion of the Master of the Rolls , three Judges, and two Doctours, Masters of the Court, between *Robert Eyre* and *William Eyre* Complainants, and *Hester*, late Wife of *Christopher Eyre* their Brother, and now Wife of Sir *Francis Wortley* , Defendant : Thus was the Case. The said *Christopher Eyre*, 15 *Jacobi* , by his last Will and Testament giveth and bequeatheth to the said *Robert Eyre* his Brother an hundred pounds , and to the said *William* his Brother a thousand pounds, and gives to the said *Hester* his Wife all the residue of his Estate , and makes and ordains the said *Hester* his sole and onely Executrix, saving, for the per-

performance of his Will, he orders *Robert Eyre* and *William Eyre*, his said Brothers, and intreats them to joyn as Executors in trust with his Wife, for the better performance of this his last Will. Afterwards, Jan. 5. 1624. being sick of the Sicknes, whereof he died, he was moved by Master *Damport* and Master *Stone* to settle his Estate : to which motion he yielded: and Master *Stone* and Master *Damport* did demand of the said *Christopher* what Friend he thought fittest to be his Executor, and to whom he would commit the care of discharging his Funerals, and performing his Will, whether he trusted any person more then his Wife to be his Executor. To whom he answered, That his Wife was the fittest person for that purpose, and therefore should be his sole Executrix. And then the Testator was moved by Mr. *Stone* to give and bequeath Legacies to his Father, to his Brethren, and to his Kindred: whereupon he answered, he would give or leave them nothing. And being farther put in mind to remember his Friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty shillings. And being there-

thereupon moved by his Wife to give his said God-son more, or a greater Legacy, or the like in effect, he said, Thou knowest not what thou doest, do not wrong thy self; twenty shillings or thirty shillings is money in a poor bodie's purse, or the like in effect: and the rest he left to his Wife's discretion or disposition. And the said Testator did speak the words aforesaid, or the like in effect, *animo testandi & ultimam Voluntatem declarandi*, as the Witnesses then present did conceive.

This Will was proved by the Oath of the said *Hester*, and this Codicill being pleaded as a Revocation of the said Bequests, the said Master of the Rolls, Judges and Doctors, were by the Lord Keeper and the Order of the Court desired to reduce the matter upon the Will and Codicill into a Case, and to certifie their opinions, whether the said Codicill were a Revocation of the Legacies given to the Plaintiffs, or not. And they, after Counsel heard at several times, viz. both common Lawyers and Civilians, and many hours spent in conference together, did finally resolve with one unanimous consent, that the Legacies to the Plaintiffs given

*Ord. 27. Jun.  
a. 2 Caroli  
Regis.*

given were not by the said Codicill revoked, and so certified under their hands. Upon reading whereof *November 25*, Decree being resolved to be made, if cause were not shewn to the contrary *Novemb. 27*; on which day the Defendant's Counsel, before the Lord Keeper, in the presence of the Master of the Rolls and the said three Judges and Sir *John Heyward*, alledging what they could in stay of the said Decree; it was by a general concurrence of opinion decreed, that the Legacies given to the said Plaintiff's should be to them pay'd on our *Lady-even*, with twenty Nobles in the hundred for the detriment thereof.

This case I thought fit to relate somewhat at large, because it pitcheth upon the point of Revocation, without plain, full and express terms. And surely, as Wills are to be made out of disposing Memories and Understandings, so also with deliberate and advised Judgments; and therefore by like reason not to be countermanded or revoked by sick or slight expressions. And this seems to me very agreeable with the rule and reason of the Common Law. For as Reason it self doth dictate, that *Nihil tam consentaneum est acquitari*

*quitati naturali, quam unumquodque dissolvi eodem modo quo conficitur;* so hath the Common Law of England, in my understanding, resolved: as for the purpose, If the King present a Clerk to a Church, and he is thereupon admitted, and instituted thereunto; now yet before Induction may this be revoked as a Will may: yet if the King shall after, and before Induction, present another man to this Church, without an express Repeal or Countermand of the former Presentation, it shall not hereby be revoked. So if Lands were conveyed to certain Uses, with a clause or power of Revocation; the Sale of the same to another did not revoke the former: but if a State were merely at will, then the Conveyance to another by the Common Law amounted to a Revocation. Therefore was the Statute made *tempore Henrici 8.* to redress this, *viz.* that where the King had granted Lands or other things to one during his pleasure, this should not be revoked by a Grant to another, without recitall of the former, and Declaration that the King had determined his pleasure.

Being now to consider of Relation in  
the

To help this  
was the  
Stat. made  
27 El. c. p. 4.

6 H. 8. cap. 9.

the Executor's Assent, it is meet, since these Discourses are principally intended for those who are not grounded Students in or Professors of the Law, that we shew what we mean by Relation, or what it is in Law. Thus therefore be it conceived, that Relation is a kind of fiction in Law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time past. As for the purpose, *A* doth bargain, and sell Freehold Lands to *B* in *August* by Indenture, which is not inrolled till *October* following; yet this hath such Relation to the Date of the Indenture, that if *A* after that, and before the Inrolment, become bound in a Statute, or granted a Rentcharge, or made a Lease for years, or took a Wife, or committed Felony, yet shall none of these be of any force to charge or prejudice the State of *B*, for that the Law adjudgeth him now owner by Relation as from the time of the Date: yea, if a Servant departing in *August*, for some great breach with his Master, do kill his Master in *October*, this is in Law petty Treason, as if he had continued Servant when he did the fact; because

it relates to the malice conceived when he was his Servant. Now then having shewed that a Term or other Chattel real or personal passeth not, nor is transferred in property to the Devisee, untill the Assent of the Executor be thereunto had ; we now put the case that this Assent is not had till a year or some such good space after the Testator's death, and make our Question, whether this shall have Relation to the Testator's death, *viz.* to be in the Law's account as if it had then been ; or, perhaps, to some purposes so to stand, and to others not so. That this is usefull and material to be known, be it thus shewed. One bequeatheth his term of Tithes of an Advowson of an House or Land by him first leased to an under-Tenant for Rent, and dieth in *May*, the Executor assenteth to the Bequest in *October*, between which two times Tithes be set out, the Church cometh void, Rent groweth payable ; now if this Assent shall relate to the Testator's death, the Devisee shall have these, else not. The like Cases may be put of the brood of Cows, Mares and Ews, fallen between the death of the Testator and the Assent ; so also of Fleeces of Sheep shorn, &c.

Now

Now to come to the Point, it is reported by the Lord Coke to have been held in the late Queen's time, that this Assent shall, as between the Executor and the Legatee, have Relation to the Testator's death, yet so that if the Executor before his Assent to the Devisee of a Lease committed Waste, now the action of Waste shall be brought against the Executor in the *Tenure* for the Waste done before, and not against the Devisee in the *Tenant*.

Tr. 41 Eliz.  
Co. l. 5. f. 12.  
B. Sanders  
Case. Vide  
Plow. co. of  
Trespass  
against a  
Stranger for  
taking be-  
fore Assent,  
280. b.

But put the case that the Legatee before the Executor's Assent granted the term to *F S*, now if to any purpose this Assent shall have Relation, it shall certainly so be to make good this Grant, as making the Legatee to be estated, and consequently able to grant before the Executor's Assent: yet do I not find any opinion or resolution in the Point, but find it debated at the Bar in the late Queen's time between *Puckering* and *Egerton*, in the Case of Administration granted to *A*, after her Grant of a free Term left by her intestate Husband; but I find no Resolution therein, nor perhaps wants their material difference betwixt that Case and the other:

A a 3 for

for there the Devisee had at least an inception of Title by gift of the Owner, wanting onely a circumstance of Assent to perfect it ; but here this Woman till Administration had not so, unless, perhaps, the Statute 21. of King *Henry the 8th*, directing or enjoyning Ordinaries to grant Administration , shall amount to a kind of Title *ad rem*, though not yet *in re*. But to return to the Point of *Assets*; Where a Reversion is granted by Deed or Fine, if the Lessee a good time after do atturn , this shall have no Relation to the time of the Grant ; so as for Wast committed or Rent grown due between the Grant and Atturment, the Grantee can have no remedy. Therefore it is good for him who buieth, or hath any thing of the Gift of a Legatee, to have the Assent of the Executor before the Sale or Gift well testified ; or if the Assent be not had till after, let him take a new Gift, that he may not rest in a doubtfull case : for besides the Premisses, that great Legist Sir *Edward Coke*, when he was a practiser ( to Mr. *Stubbs* of *Norfolk*) for his Fee, gave his Opinion, as I have been confidently informed , that where a Lessee for years being outlawed did grant his Term, and after reversed  
the

the Outlawry, this did not make good the Grant by Relation, it not being in the Grantor at the time of his Grant. And this hath much affinity with the principal Point; for there, if the Relation help not, the Grant is not good from the Legatee.

*Divers Cases of Bequests considered and expounded.*

IF a Termour of an House bequeath his <sup>14 Eliz. Dy.</sup> House to *B*, without expressing how <sup>307. Cont.</sup> in a Grant, long he should have it, he shall have the <sup>31 Eliz.</sup> whole Term and number of years. So of Land.

Also of the name of the House, the Orchards, Gardens and Backsides do pass: yea, if the House with the Appurtenances be bequeathed, thereby the Lands belonging to the House, or used with it, do pass, though yet they would not so doe by such words in any Lease, Deed, or Grant. Yet by some Civilians, or Canonists, the Orchard belonging to an House shall not pass by the onely Gift of the House, without some words shewing the Intent of the Testator so to

*Sum. Sylv.*  
286.

A a 4   be,

be, or except one Gate or Door lead as well to the Orchard as to the House : but some other of them hold, that it doth pass without any such help of circumstance, so as it be adjoining to the House.

If a Lessee for years give his Term by his Will to *A*, he shall have it without paying any Rent, for the Executors shall pay it for him, as I find in the Summest ; but against Reason, methinks.

*Ibid. ut sup.* If one bequeath his Indenture of Lease, his whole state in that Lease passeth. So if one bequeath his Obligation or other Specialty, the Debt or Duty it self shall go to the Legatee ; and by the Canon or Civil Law the very Action it self passeth, *viz.* as I conceive, ability to sue the Debtor in his own name : but in our Law it is otherwise, the Suit must be in the Executor's name, for a Debt or thing in Action cannot be assigned, except by or to the King ; and onely at the Common Law is the Debt recoverable; but the Spiritual Court may force the Executor to sue, or let his name be used in the Suit, for and by the Legatee.

Yet 48 E. 3.  
12, 13. it is  
admitted,  
that such a  
Devisee of  
all Goods,  
after Debts  
pay'd, shall  
have a Duty  
resting in  
account.

If one bequeath all his Moveables, Debts due to him are not bequeathed, nor Corn, nor Fruit growing on the ground,

ground, nor Stone, nor Timber prepared for Building, as the Canonists and Civilians hold.

On the other side, if one bequeath the moyety of all his Goods, the Legatee shall have onely the moyety of that which remains after Debts payed; for that onely is to be accounted the Testator's which he hath *ultra eas alienum*.

By a Bequest of all Utensils or Household-stuff, Plate nor Jewels are not given.

If one bequeath to his Wife all her Apparel, she shall not have, as some Civilians say, her Ornaments of Gold or Silver; by which is meant, as I take it, Chains, Jewels, Bracelets, Rings, &c. But others are of contrary opinion, except they be such things as are not lawfull for her to wear.

If a Bed be given by a Will, *Venit ornamentum ejus*, saith the Civilian, that is, the Furniture thereof passeth, viz. not onely the Bed, Bed-stead, Bed-cloths, but also the Curtains and Vallans, as I take it. But I think that by gift of a Coach by Will, the Coach-horses pass not; yet perhaps the Furniture of the Coach-horses may pass as appurtenant to the Coach; for so I think they shall doe, rather then by Bequest of the Coach-horses without the Coach.

If

*Quæ. 36 H. 8.*  
*Dy. 59. Dy.*  
*ibid. supra,*  
*Sum. Sylv.*  
*286.*

*Ibid.*

If one bequeath to *A* Meat, Drink and Cloathing, or *Alimenta*; he shall have, saith the Civil Law, also Lodging, Habitation, and all things necessary for the maintenance of life, *viz.* as I take it, Fire and Washing, &c.

*Ibid. b.*

If one bequeath to his Daughter ten pounds a year for her Apparelling, and she demandeth none in four years; now shall she not after that time have the Arrerages of this ten pounds by year for the time passed.

*Ibid.*

If a man bequeath one of his Horses or Cows, not naming which, to *f s*, he is to chuse which he will, so it be not the best of all, saith the Civil Law: and perhaps the mention of that exception grows out of respect to the Herriot, which the Lord should have, or the Mortuary, which the Parson should have.

*Ibid.*

A man bequeathed thirty pieces of twenty shillings to *A*, twenty to *B*, and ten to *C*, to be had in such a Chest or Casket, and it is found after his death that there be but thirty in all in that Casket or Box; now each shall be abated ratably, saith my Summist, so as *A* shall have fifteen, *B* ten, and *C* five: and this stands with good Reason and Justice; for so

so each hath a proportionable part. And it were reasonable that it were by Parliament established for Law, that all, both Legatees and Creditors, should be pay'd in like proportion, where the State will not suffice for full payment of each, rather then that an Executor should have power to pay one all, and another nothing: yet if the Testator left sufficient to make good all those sixty pieces bequeathed, *Quære*, if that which is wanting in the Casket shall not be supplied and made up; for if the Cases following found with the same Authour be good Law, it should seem so to be.

If one, saith he, bequeathed to *f S* *Sum. Sylv.*  
286. that which is another man's, and where-to the Testator hath no right; then ought his Executor to buy it, and give it to the Legatee, or else satisfie him to the full value; and this not onely by the Civil, but also by the Canon Law, and in *foro Conscientiae*, saith my Authour.

Again, If *A* bequeath to *B* such an *Ibid. 287.* Horse by name, and after sell away that Horse, and dieth; now is his Executor bound to answer the value thereof to *B*: and if the Testator after his sale of that Horse had bought another, and called him

him by the same name as the first; now shall this latter Horse pass to *B*, saith the Book, except it can be proved that the Testator sold the former Horse of purpose to revoke his Will touching that Bequest.

Ibid. 286.

So again I find, that if one having but a moyety or one half of green Close, or of a Stack of Corn, or other Chattel, doth give the whole, so as the words be apparent to reach to more then his moyety, then must the Executor buy out the other's part for the Legatee, or give him the value: but if the words be but general, so as they may be reasonably satisfied with the Testator's part, no supply shall be made. So also if one, having Goods in pledge, bequeath them, it shall be construed to extend no farther then his right.

Ibid. 284.2.

A Bequest is made of an hundred pound to be pay'd at a future time, *viz.* divers years after the Testator's death; a Question is made by the Summist, whether the profit of the money in the mean time shall go to the Legatee, or the Executor: and he resolves with this difference, if the day were given in favour of the Legatee being an Infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were

were in favour of the Executor, then shall the Legatee have but the bare sum, without any addition of mean profits.

If one bequeath all his Term or Goods <sup>15 Eliz. D. 5.</sup> to his Executor for payment of his Debts, <sup>331.</sup> or Debts and Legacies, it is a void Bequest; because it is no more then the Law would say, if he had said nothing. <sup>Plow. Com. 545. b.</sup> So if it be generally to perform his Will.

If one, seized in Fee-simple of Land, bequeath it to his Executor to pay Debts, <sup>Co. lib. 8. 96. a.</sup> the Executor hath no state of Free-hold: for if he should, then it must be either for life, which might end by his quick death before Debts payed; or in Fee-simple, which would carry away the Land for ever from the Heir, where perhaps a few years profits might suffice to satisfie the Debts; yea then by death of the Executor the Land should descend to his Heir, and not go to his Executor, who would be Executor of the first Testator.

If one give or grant all his Goods, having Leases for years as well as Moveables, the Leases shall not pass, as was held in the time of K. Edward the sixth. And so also was it admitted in *Portman's Case*. For the word *Bona* comprehendeth onely Moveables, by the better opinion there.

By deed or word in life.  
4 E. 6. Bro. Done, &c.  
43. Tr. 37 El. in ba.  
reg. Portman ver. Simmes,  
or Willis,  
divers times argued.

But

But the Point in that case was pertinent to this place, *viz.* a Bequest in a Will of all the Testator's Goods: and whether thereby a Lease for years passeth or not, was divers times debated, but not resolved, the Judges differing in Opinion in that Point; but in another Point, which made an end of the Case, all agreed. Yet the better Opinion was, as I find in my Report, that a Lease would pass by such words in a Will, though not in a Deed or Grant by word otherwise made; for the Legacies are demandable in the Spiritual Court, where *Bona & Catalla* are taken for all one. See also the Statute of *Marlbr.* giving an Action to the Successor, *Ad repetenda bona prædecess.* Yet an *Eject. custod.* hath been maintained thereupon. So also upon the Statute of Executors, *De bonis asportatis in vita Testatoris*, hath it been resolved, and where Administration is granted, it is onely *omnium Bonorum*, without speaking of Chattels; yet hath the Administrator interest in Leases as well as Moveables. On the other side, the Statute *de Prærog. reg.* mentioning onely Forfeiture *de Catallis*, is clearly extended to Moveables: so also in the Writ of Assize *De catalis que in eo capta fuerint*, and in the Writ of

Cap. 28.

4 E. 3. c. 7.  
So the Stat.  
§ R. 2. of  
Forfeiture  
of goods by  
those who  
go beyond  
the Sea, *ca.*  
16. In all  
these Goods  
are compre-  
hended.

of Execution upon a Statute there is onely the word *Catalla*, and not *Bona*: and in the Case reported by *Kelway*, temp. *Henry the 7th*, it seems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that these Statutes and Writs were alledged or considered of temp. *Edw. 6.* but in *Portman's Case* the most of them were.

13 H. 7.  
Kelw. 152.  
35. a.

If one will that his Wife, or any other, shall have, or hold, or enjoy the moyety of his Lease with his Executor, this implieth not that the Executor have the other moyety as a Legacy also, but otherwise as the Law casts it upon him; no more then where the moyety of Fee-simple Land is devised to the younger Son, this shall not make the elder Son to have the other moyety otherwise then by descent, as between *Low* and *Carter* was conceived. But there being a Proviso in the Wife's Bequest, that if she married from the House, then, &c. *Popham*, Ch. Justice, held, that if she married at all, this was a marrying from the House; for she was no longer Widow of that House, though she married with one of that Kindred, and who had no other House, but would dwell in the bequeathed.

*Low & Carter's Case,*  
*Tr. 37 El. in.*  
*ba. reg.*

## CHAP. XX.

*Of the Executor of an Executor.*

I Should be taxed of omission , if I should not shew whether the things forespoken of Executors immediate extend also to the mediate or more remote Executors. Assuredly, were I not by the Books otherwise informed , I should think it somewhat strange that the mediate Executor in the fourth , fifth , or farther degree, should not by the rules of the Common Law stand in like plight Executor to the first Testator, as the first and immediate Executor , as well as the Heir and Assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate Heir and Assignee. And indeed, we find both in the time of *Edward* the second and *Edward* the third Execution sued out upon a Judgment and Statute by an Executor of an Executor ; and why he might not as well maintain an Action of Debt, &c. I see not. But

*See Plow.*  
184. a Debt  
against the  
Executor of  
an Executor.

19 Ed. 2. &  
1 Ed. 3.  
Fitz. Execu-  
tor 87, &  
203.

I must

I must confess, I find both Books to the contrary before any Statute made in the point, and after an Act of Parliament to enable them to bring Actions, and to make them subject to Actions; yet the Statute speaks nothing of conferring upon them the Testator's Goods. Now if they had title to them before that Statute, and without the help of that Statute, it is strange if they should not be suable for Debts. But since that Statute, and at this day, where by a Will a special Trust is recommended to an Executor, as to sell Land, &c. this not performed in his lifetime shall not be performable by his Executor: contrariwise of an Interest, as to take the Profits of Lands for certain years towards payment of Debts and Legacies. And where the Statute *temp. H. 8.* gives remedy to Executors for recovery of Rents of Inheritance behind in the Testator's life, I doubt not but Executors of Executors are within the equity, as well as within the Statute 9 Ed. 3. cap. 3. that the Executor who appears at the grand Distress shall answer alone. Yet the Statute Westm. 2. cap. 23. for Executors, was taken not to extend to Executors of Executors.

*Quod non est lex.* So as now in all cases,

B b

except

11 Ed. 5. &

13 Ed. 3.

Fitz. Exec.

78.

25 Ed. 3. c. 5.

19 H. 8. 9, 10.

4 El. Dy. 201.

32 H. 8. cap.

37. So 32 H.

8. 28. Leases.

And 32 H. 8.

cap. 33. Con-

ditions. And

13 El. cap. 5.

& 27 El. cap.

4. of frau-

dulent Con-

vveyances.

21 H. 8. cap.

15. for falsi-

fying Reco-

veries.

39 H. 6. 45.

7 E. 3. 62.

except of special trust or authority, without the office of Executorship, the Executor of an Executor, how far soever in degree remote, stands as to the points both of Being, Having and Doing, in the same state and plight as the first and immediate Executor.

---

## CHAP. XXI.

*Touching Administrators.*

OF these also, as standing in much affinity with Executors, it may be by some expected that I should have treated. But first, my excuse is, that these of Executors onely having grown to so great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of Having and Doing is before set forth and shewed touching Executors, may be applied to and understood of Administrators; though not what is spoken of Being and unbeing, or Revocation of Executorships, and other circumstantial points.

Lastly, I may, perhaps, if these find good acceptance, add eere long that which ap-

appertaineth to Administrators distinguished from Executors, or wherein they stand in different state.

---

## CHAP. XXII.

*Considerations in Conscience touching payment of Debts, Legacies, and the preferring or respect of persons.*

**T**O the Advertisement, what course Executors are to hold in their payments, I thought good to adde this *in foro Conscientia*; That whenas it shall stand in the Executor's Will and Election to pay whom he will and as he will, in respect of equality in the dignity and degree of the Debts, all being for the purpose by the Specialty, and none of Record, and yet he hath not wherewith to pay or satisfie all, here he may have three ways or courses in his eye.

First, where there is equality in the honesty and Conscience of the Debts, there (except in the ability of the parties to bear loss the disproportion may otherwise occasion) methinks it should be most honest and just to pay every one proportionably,

nably, and to let the loss of every one to be equal. And the justness of this is taught by the Law, which gives the *Audita querela* for equal contribution in bearing of loss by them who stand in equal degree : so of Legacies.

2. The poverty and inability of some, and the plenty of others, may *in foro Conscientiae* justifie the paying more to one, and suffering him to lose less, ( if any thing ) then another. For if the Widow's mite was a greater gift , so a greater loss then more out of abundance. Where Charity finds or may find place or nearness to place of giving, it may find greater motives of preserving from loss : so of Legacies.

3. The nature of the Debts, and so sometimes of Legacies, may be so different, as thence may spring a just motive to disproportion payments , to pay more to one then another, rate for rate, and so to suffer one to lose more then another. One Debt may perhaps be Use for money, or at least money lent for Use ; another may be money freely lent ; another Debt for Land of Inheritance bought ; another Debt for a Lease, Chattels or Moveables, come to the Executor. The first merits the least respect, next the second, then the third

and

nd the last the most. But where without  
ny of these motives there is not equali-  
ty held in the payment, *peccatur* (as I  
hink) *in Conscientiam*. But let every one  
tand or fall by or to his own, or to him  
who is greater then his Conscience. This  
equality Saint *Paul* in another case re- <sup>2 Cor.8.14;</sup>  
commends to the *Corinthians*. And *Solo-*  
*mon*, whilst no inequality appeared in the  
point of right, shewed his disposition to  
have made an equal division of the Child  
between the Mothers, who were joyned  
Claimors and Competitors for it.

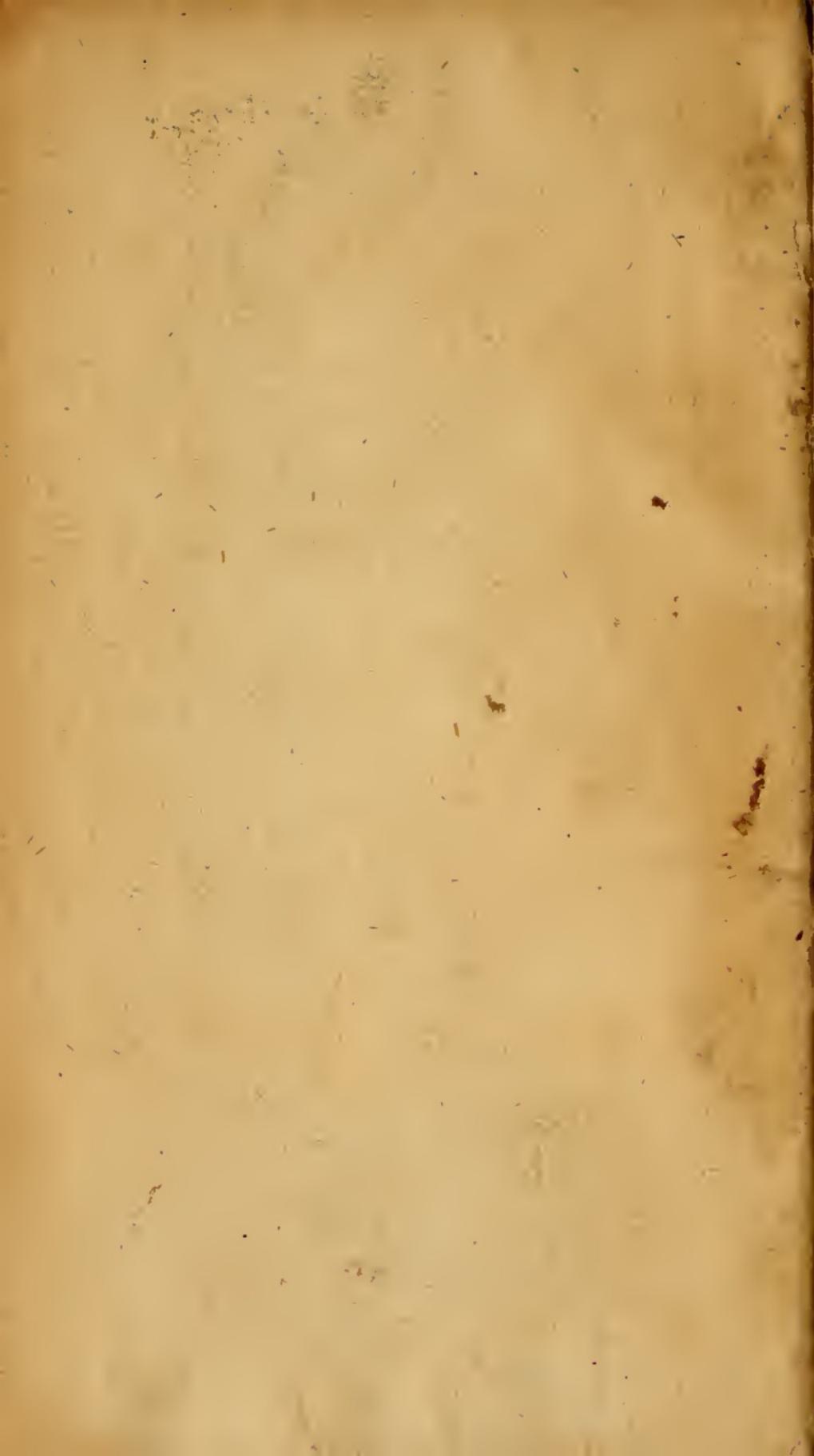
See more of Conscience, *Doct.* and  
*Stud.*

---

**F I N I S.**

120000





W 11<sup>m</sup> Jecklinis  
agia & liban

2003:10.19

Agave  
Oahu

Or

~~are~~ ~~are~~

Wm J. Lewis

